FEDERAL POWER ACT AMENDMENTS OF 1982

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY REGULATION

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2500

A BILL TO AMEND THE FEDERAL POWER ACT TO REDUCE CONFLICTS IN THE LICENSING OF HYDROELECTRIC POWERPLANTS AND TO EXPEDITE THE DEVELOPMENT OF AND SIMPLIFY THE REGULATION OF HYDROELECTRIC POWERPLANTS AND FOR OTHER PURPOSES

JULY 22, 1982

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CONTENTS

	Page
S. 2500	6

STATEMENTS

Brown, Peter W., director, Franklin Pierce Energy Law Institute, Concord, N.H., accompanied by William H. Wilson, senior research fellow, Franklin Pierce Energy Law Institute	66
Hobart, Larry, deputy director, American Public Power Association, accompanied by Allan Richardson, legislative director and counsel, APPA	39
Humphrey, Hon. Gordon J., a U.S. Senator from the State of New Hampshire	1
Marker, Gordon, A., president, National Alliance for Hydroelectric Energy	59
Nygaard, Kristina, Assistant General Counsel, hydroelectric licensing, Federal Energy Regulatory Commission	10
Verney, Richard G., chairman, Monadnock Paper Mills, Inc., Bennington, N.H., on behalf of the American Paper Institute, accompanied by John T. Ferguson, legislative counsel, Georgia-Pacific Corp	42
Wilson, William H., senior research fellow, Franklin Pierce Energy Law Institute	69

APPENDIX

Additional material submitted for the record	83

FEDERAL POWER ACT AMENDMENTS OF 1982

THURSDAY, JULY 22, 1982

U.S. SENATE,
SUBCOMMITTEE ON ENERGY REGULATION,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 3110, Dirksen Office Building, Hon. Gordon J. Humphrey, presiding.

Present: Senators Humphrey and Nickles.

Also present: Dan Freihofer, professional staff member, and Elizabeth Moler, counsel for the minority.

OPENING STATEMENT OF HON. GORDON J. HUMPHREY, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator HUMPHREY. Good morning. The Subcommittee on Energy Regulation meets this morning to receive testimony on S. 2500, a bill to amend the hydroelectric licensing provisions of the Federal Power Act.

For the past 12 months, the Subcommittees on Energy Regulation and Water and Power have conducted a series of four hearings on how the Federal hydropower licensing system might be expedited and improved in a manner consistent with the public interest. We have seen an enormous increase in the number of filings with the Federal Energy Regulatory Commission—from less than 100 in 1979 to over 1,800 in 1981. Virtually all witnesses, including FERC, have testified that major delays are looming over the hydropower licensing program.

One recurrent suggestion has been that the Federal Power Act be amended to simplify and make more equitable the FERC process for determining who should be awarded development rights to a given dam site. Roughly half of the 1,800 filings with the FERC in 1981 involve so-called contested sites. For each of these sites, the FERC must go through an elaborate process for choosing between applicants. With staff resources already spread thin, this function alone has caused considerable delays in the processing of applications.

On a more basic level, I am troubled by the speculation and "claim jumping" which the present system encourages. Because the Federal license confers full condemnation authority on the developer, little regard need be given by developers or the FERC to the issue of who owns the actual hydro site. In fact, strong incentives exist for prospective developers to bypass private negotiations and

State property law and apply directly to the FERC for a hydropower license.

Too often battles over development rights are not resolved at the State or local level. They are transferred through the licensing process to the strange and distant halls of the FERC, where an overburdened staff is expected to make a determination based on the "public interest."

To cite one outrageous example, my home State of New Hampshire is being threatened with the loss of several sites it owns and wants to develop simply because another party was first to file a piece of paper—a preliminary permit application—with the FERC.

I would point out that this is not a markup. It is a hearing. We are asking for your opinions, and particularly your constructive suggestions. I hope that some meeting of the minds can be achieved over the next several weeks.

[The prepared statement of Senator Humphrey and the text of S. 2500 follow:]

OPENING STATEMENT OF SENATOR GORDON HUMPHREY

Good morning. Today the Subcommittee on Energy Regulation will receive testimony on S. 2500, a bill to amend the hydroelectric licensing provisions of the Federal Power Act. I appreciate our witnesses' interest in both this legislation and some of the broader issues affecting hydro development in this country.

Over the past twelve months, the Subcommittees on Energy Regulation and Water and Power have conducted a series of four hearings on how the federal hydropower licensing system might be expedited and improved in a manner consistent with the public interest. We have seen an enormous increase in the number of filings with the Federal Energy Regulatory Commission--from less than 100 in 1979 to over 1,800 in 1981. Virtually all witnesses, including FERC, have testified that major delays are looming over the hydropower licensing program.

One recurrent suggestion has been that the Federal Power Act be amended to simplify and make more equitable the FERC process for determining who should be awarded development rights to a given dam site. Roughly half of the 1,800 filings with the FERC in 1981 involve so-called "contested sites." For each of these sites, the FERC must go through an elaborate process for choosing between applicants. With staff resources already spread thin, this function alone has caused considerable delays in the processing of applications.

On a more basic level, I am troubled by the speculation and "claim jumping" which the present system encourages. Because the federal license confers full condemnation authority on the developer, little regard need be given by developers or the FERC to the issue of who owns the actual hydro site. In fact, strong incentives exist for prospective developers to bypass private negotiations and State property law and apply directly to the FERC for a hydropower license.

Too often battles over development rights are not resolved at the State or local level; they are transferred through the licensing process to the strange and distant halls of the FERC, where an overburdened staff is expected to make a determination based on the "public interest."

To cite one outrageous example, my home state of New Hampshire is being threatened with the loss of several sites it owns and wants to develop simply because another party was first to file a piece of paper -- a preliminary permit application -- with the FERC.

Lawyers notwithstanding, I do not see how this system can effectively serve the public interest. I do not see how it serves this Administration's emphasis on New Federalism nor its de-emphasis on the use of federal eminent domain for energy development.

S. 2500 represents an attempt to come to grips with these problems. It creates strong incentives for developers to acquire the necessary property interests before coming to the FERC for a license. The first is a codification

of the priority accorded through FERC regulations for exemption applicants. Currently an exemption applicant must demonstrate an enforceable property interest in both federal and non-federal property necessary to develop the project in order to qualify.

Second, S. 2500 proposes an "owner preference" in the permitting and licensing of projects. This would displace the present "tie-breaker" concept and "municipal preference" by providing that unless someone else's proposal is "substantially superior", the site owner will be awarded development rights. If no single site owner emerges, the present municipal preference would then apply.

Finally, the bill modifies the Act's eminent domain provision by replacing the "fair market value" standard with a measure of compensation based on "the highest and best use for which the property...may be put."

Section 6 of the bill would establish that all permit, exemption, and license applications pending before the FERC on the date of enactment would be subject to the new rules. The bill would <u>not</u> be applicable to those sites where a permit, exemption or license has been granted or in cases where a FERC decision on competing applications has been formally appealed. The bill is also not intended to apply to the re-licensing of projects whose first license has expired.

I would be the last one to pretend devine wisdom in the drafting of this legislation. I look forward to your testimony, and with this said, let us proceed to the first witness.

97TH CONGRESS
2D SESSION

S. 2500

To amend the Federal Power Act to reduce conflicts in the licensing of hydroelectric powerplants and to expedite the development of and simplify the regulation of hydroelectric powerplants and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 6 (legislative day, APRIL 13), 1982

Mr. HUMPHREY introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

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A BILL

To amend the Federal Power Act to reduce conflicts in the licensing of hydroelectric powerplants and to expedite the development of and simplify the regulation of hydroelectric powerplants and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Power Act Amendments of 1982."

SEC. 2. Section 3 of the Federal Power Act (16 U.S.C. 796), is amended by adding the following new subpart (23) to read:

"(23) Qualified exemption applicant means any person, State, or municipality which has met the requirements of an application for exemption from part I of the Federal Power Act as provided by section 30 of this Act, section 408 of the Energy Security Act of 1980 (16 U.S.C. 791), or other provisions of this Act and which has the property interests necessary for the development of the proposed hydroelectric project, exclusive of any property interests necessary for a transmission right of way.".

SEC. 3. Sections 7(b) and 7(c) of the Federal Power Act (16 U.S.C. 800 (b) and (c)), are redesignated sections 7(d) and 7(e) respectively.

SEC. 4. Section 7 of the Federal Power Act (16 U.S.C. 800), is hereby amended to add the following new subsections (a), (b), and (c):

(a) Except as provided in subsection (d) of this section, the Commission shall give preference to a qualified exemption applicant, unless the plans for the development of the proposed project by a license applicant or a preliminary permit applicant are substantially superior to the plans of the exemption applicant for the development of the waterway and the conservation and utilization in the public interest of the water resources of the region.

(b) Except as provided in subsection (d) of this section, in issuing preliminary permits hereunder or in issuing licenses

where no preliminary permits have been issued, the Commission shall give preference to applications therefore by any person who has the property interests necessary for the development of the proposed project, exclusive of any such property interests owned by Federal governmental entities and exclusive of any property interests necessary for a transmission line right-of-way, unless the plans for the development of the proposed project by another license applicant or applicant for a preliminary permit are substantially superior to the plans of the owner applicant for the development of the waterway and the conservation and utilization in the public interest of the water resources of the region.

(c) Except as provided in subsection (d) of this section and subject to the preference provisions of subsections (a) and (b) of this section, in issuing preliminary permits hereunder or licenses where no preliminary permits have been issued, the Commission shall give preference to applicants therefore by States and municipalities, unless the plans for the development of the proposed project by another license applicant or applicant for a preliminary permit are substantially superior to the plans of the State or municipality for the development of waterway and the conservation and utilization in the public interest of the water resources of the region; and as between other applicants not granted a preference under subsections (a), (b), and (c) of this section, the Commission may

give preference to the applicant, the plans of which it finds and determines are best adapted to develop, conserve and utilize in the public interest the water resources of the region.

SEC. 5. Section 21 of the Federal Power Act (16 U.S.C. 814), is hereby amended to add the following sentence after the sentence ending with the word "$3,000." In all cases arising under this section, the measure of the amount of compensation to be paid by any licensee shall be based on the highest and best use for which the property subject to condemnation may be put.

SEC. 6. This act shall be applicable to any hydroelectric project which is not subject to subsection (d) of section 7 of this Act and with respect to which no preliminary permit, license or exemption has been issued by the Commission on the effective date of this Act.

Senator HUMPHREY. Our first witness is Kristina Nygaard.

STATEMENT OF KRISTINA NYGAARD, ASSISTANT GENERAL COUNSEL, HYDROELECTRIC LICENSING, FEDERAL ENERGY REGULATORY COMMISSION

Ms. NYGAARD. Good morning.

Senator HUMPHREY. How do you chose to proceed? Are you going to read your statement?

Ms. NYGAARD. No, Mr. Chairman, just an introductory paragraph and then I will submit my testimony to you.

Senator HUMPHREY. Fine.

Ms. NYGAARD. Mr. Chairman, I am pleased to be here this morning to discuss Senate bill 2500, a bill to amend the Federal Power Act for the purpose of protecting the property rights of dam site owners in the Federal hydropower licensing process.

I am Assistant General Counsel for Hydroelectric Licensing at FERC. I would like to state at the beginning that I am appearing before you as a technical expert and speak only for myself, and not for the members of the Commission.

My testimony discusses the current regulatory framework and the past Commission treatment of the ownership factor. I have submitted some technical comments on the bill and tried to estimate possible impact of the bill on the Commission workload. I will be pleased to answer any questions.

Senator HUMPHREY. Fine.

[The prepared statement of Ms. Nygaard follows:]

STATEMENT OF

KRISTINA NYGAARD

ASSISTANT GENERAL COUNSEL FOR HYDROELECTRIC LICENSING,

FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and members of the Subcommittee, I am pleased to be here this morning to discuss S.2500, a bill to amend the Federal Power Act for the purpose of protecting the property rights of dam site owners in the federal hydropower licensing process.

My name is Kristina Nygaard, and I am Assistant General Counsel for Hydroelectric Licensing at the Federal Energy Regulatory Commission. I would like tc state at the beginning of my testimony that I am appearing before you as a technical expert and speak only for myself, not for the members of the Commission.

Current Regulatory Framework

I would like to begin my remarks by reviewing the statutory and administrative rules by which the Commission currently chooses among competing applications for preliminary permits and licenses.

Section 7(a) of the Federal Power Act (16 U.S.C. §800(a)) requires the FERC to give preference to applications for preliminary permits or, where no permit has been issued, for licenses filed by States and municipalities over applications filed by citizens and corporations, provided their plans are equally well adapted or within a reasonable time are made equally well adapted "to conserve and utilize in the public interest the water resources of the region... ."

When competition is confined to solely non-preference applicants or solely preference applicants, Section 7(a) states that the Commission may give preference based on the superiority of an applicant's plans, provided the Commission is "satisfied as to the ability of the applicant to carry out such plans."

The Commission's regulations implementing Section 7(a) appear at 18 C.F.R. §4.33(g). They provide that the permit or license (where no permit preceded it 1/) will be issued to the applicant whose plan is better adapted to develop, conserve, and utilize in the public interest the water resources of the region. Where the Commission is unable to find that one applicant's plan is superior to another's, the permit or license is issued as follows:

a) where a municipality is in competition with non-municipalities, the municipality prevails;

b) where all competitors are non-municipalities, the first-in-time applicant prevails;

c) where there is more than one municipal applicant, the first-in-time municipality prevails.

Past Commission Treatment of Ownership Factor

The Federal Power Act affords no explicit preference for site-owner applicants over non-owner applicants. Under the Commission's current regulations, the element of site ownership can only come into play in an assessment of whether any applicant has a better adapted plan. (18 C.F.R. §4.33(g).)

1/ Where one of the license applicants is the permittee, the Commission has invoked its discretion under Section 7(a) to imbue the permittee with the same preference at the licensing stage that a municipality enjoys at the permit stage (or at the licensing stage if there is no permittee). 18 C.F.R. §4.33(h).

To date, the Commission has not ruled on whether site ownership would be the dispositive factor in determining that one applicant's plan is better adapted than another's to conserve and utilize in the public interest the water resources at issue. There are currently pending before the Commission a number of cases which may pose to the Commission the question of whether site ownership should be dispositive, or merely one element among others, or neither.

Technical Comments on S. 2500

1. Comparison to Existing Law and Practice

Briefly stated, S. 2500 would create three tiers of preference for authorizing study and development of hydroelectric sites. The first tier would be qualified exemption applicants, who would be preferred unless a competing preliminary permit or license application offered substantially superior development.

S. 2500 would require an exemption applicant to have the non-federal property interests necessary for the development of the proposed hydroelectric project, exclusive of any property interests necessary for a transmission right-of-way. This would essentially codify the Commission's regulations on who may apply for an exemption, except in one major respect. The Commission's regulations permit an exemption applicant to merely have an option to obtain the requisite interest. (18 C.F.R. 4.103(b)(2)(ii).)

98-140 O—82——2

The Commission does not issue exemptions for projects which would utilize the water power potential of an existing dam that is owned by the United States or any instrumentality of the Federal Government. (18 C.F.R. 4.102(l)(1).) However, the Commission does issue exemptions for projects located on Federal lands. (18 C.F.R. 4.103(b)(2).) In the case of competing exemption applications for a project on Federal lands, the Commission practice is to issue the exemption to the first-to-file applicant, unless a subsequent application proposes a more comprehensive development. The recipient of a Commission exemption may still have to obtain the right to use or occupy Federal lands from the admininstering Federal land agency; the Commission gives it one year to do so. (18 C.F.R. 4.106(e).)

The Commission's current regulations state that the Commission will favor the exemption application over a permit application. (18 C.F.R. 4.104(e)(1).) However, as between exemption and license applications, the Commission's regulations provide that the Commission will favor the application first filed, unless it determines the plans of the subsequent applicant propose a better development. (18 C.F.R. 4.104(e)(2).)

Pursuant to S. 2500, the second tier of preference would be for the application for permit or license (where no permit has been issued) by any person who has the property interests necessary for the development of the proposed project, exclusive of federal property or transmission line rights-of-way. This

preference can be rebutted if a non-owner proposes a substantially superior development.

As I have described, the Commission currently has no statutory mandate or administrative policy which bestows an ownership preference of this kind.

The third tier of preference under S. 2500 would be for the application for preliminary permit or license (where no permit has been issued) by a State or municipality. This preference can be rebutted if a non-municipal applicant proposes a substantially superior development.

S. 2500 differs from the existing statutory municipal preference in several respects. First, whereas the existing Section 7(a) explicitly applies the municipal preference provision to the issuance of licenses to new licensees under Section 15 of the Federal Power Act, S. 2500 makes no reference to Section 15. The implication is that the third tier of preference under S. 2500 would not apply to relicense proceedings, which are provided for in Section 15. Since the text of S. 2500 does not however compel this conclusion, it may be useful to confirm the drafters' intent in some explicit manner. Second, S. 2500 would alter the municipal preference from that of a tie-breaker to that of a rebuttable presumption. Third, S. 2500 would omit the existing provision in Section 7(a) which provides a municipality a reasonable time (to be fixed by the Commission) to make its proposal equally well adapted as that of any non-municipal competitor.

Below the three tiers of preference proposed by S. 2500 is a catch-all provision similar to the existing clause in Section 7(a). Namely, where none of the preferences apply, the Commission may give preference to the applicant, the plans of which it determines are best adapted to develop, conserve and utilize in the public interests the water resources of the region. However, whereas the existing Section 7(a) adds that use of this standard requires a finding that the applicant is able to carry out its plans, S. 2500 would omit this qualifier.

Finally, S. 2500 would amend Section 21 of the Federal Power Act to specify that, in exercising the right of eminent domain to obtain requisite property rights to operate a licensed project, the licensee must pay compensation based on the highest and best use for which the property subject to condemnation may be put. The current provision requires the practice and procedure in any eminent domain proceeding to conform as nearly as may be with the comparable practice and procedure in the courts of the State where the property is situated.

2. Possible Impact of S. 2500 on Commission Workload

The Commission staff compiles statistics on the number of applications filed and the number of competitive proceedings. The attached appendices detail the number of preliminary permit, license and exemption from licensing applications filed with the Commission in fiscal year 1981. Attachment C shows that the Commission received

1,859 applications for preliminary permit for 1,200 different sites and 105 applications for license for 87 different sites.

The Commission staff does not compile statistics on how many permit or license applicants are site owners. It is therefore difficult to assess what the impact of S. 2500 would be on pending competitive proceedings. It is reasonable to assume, however, that the bill would substantially reduce competition, largely due to the escalation in the price of invoking eminent domain powers under a license. Other disincentives to competition would be the owner preference and the need for a "substantially superior" proposal in order to rebut the preferences for site owners and municipalities.

S. 2500 would extend from exemptions to permit and license proceedings the Commission's need to determine whether competitors claiming owner preference in fact have the requisite property interests. In applying this standard to exemption applicants, the Commission has adopted the policy of denying an exemption application where there is a colorable dispute as to the applicant's possession of the necessary property rights. This policy is based on two considerations: the adjudication of property rights is more appropriate for a forum of competent jurisdiction, and such adjudication could significantly delay the project, thus undermining an important purpose of exemptions. (See Fluid Energy Systems, Inc., et al., 19 FERC ¶61,040 (April 13, 1982).) Were the Commission to use the same approach for owner

preference, there would be fairly expeditious resolution of whether the preference could be invoked, but colorable challenges to ownership claims could defeat the preference.

S. 2500 states (in Section 6) that these amendments to the Federal Power Act would be applicable to any hydroelectric project (not recommended for federal development) with respect to which no preliminary permit, license, or exemption has been issued by the Commission on the effective date of this act. The section by section analysis of the bill specifies that permit, exemption, or license applications pending on the effective date of the act would be subject to the new rules. As I read this proposed provision, it does not compel the Commission to extend filing deadlines or otherwise reopen pending proceedings in order that applicants may submit evidence to demonstrate eligibility for the newly created preferences. This is apparently left to the Commission's discretion.

This concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions which you may have.

APPENDIX

FEDERAL ENERGY REGULATORY COMMISSION
DOCKET STATUS REPORT -- EXCLUDING SPECIAL CASES,
INCLUDING CONSOLIDATIONS
EXACTLY REPORTING PERIOD: 6/01/82 - 6/30/82

		Pending Beginning of Period	Received During Period	Completed During Period	Pending End of Period
01	Major Hydro-Constructed	15	0	1	14
02	Major Hydro-New Cap.(formal)	7	0	0	7
03	Major Hydro-New (non-formal)	117	14	7	124
04	Major Hydro Relicense (formal)	10	0	0	10
05	Major Hydro Relic. (non-formal)	27	0	1	26
06	Minor Hydro-New Capacity	67	10	1	76
07	Minor Hydro-Relicense	4	0	0	4
08	Minor Hydro-Constructed	11	1	0	12
09	Amendments to Licenses	89	10	10	89
10	Amendments (New Capacity)	23	2	2	23
11	Surrenders (Abandonment)	1	0	0	1
12	Transfers	2	2	1	3
13	Elec. Lic.-Preliminary Permits	787	44	70	761
14	Elec. Lic. - Trans. Lic. Applic.	5	0	1	4
15	Elec. Lic. - Change Land Right	12	1	0	13
16	Elec.-Declaration Intention	9	0	0	9
17	Exemptions-Hydro Licensing	183	48	36	195
18	Surrender Preliminary Permits	30	6	26	10
SUBTOTAL - HYDROELECTRIC		1399	138	179	1381

B

FY 81 Applications Received and Completed by Capacity

	Received During Period	Completed During Period
Less than 5 Mw		
Minor Hydro	31	25
Major Hydro	13	9
Amendments (New Capacity)	13	5
Preliminary Permit	930	627
	987 = 51%	666 = 51%
5 Mw - 15 Mw		
Major Hydro	11	5
Amendments (New Capacity)	7	4
Preliminary Permit	372	250
	390 = 20%	259 = 20%
Greater than 15 Mw		
Major Hydro	10	5
Amendments (New Capacity)	2	2
Preliminary Permit	557	377
	569 = 29%	384 = 29%

C

FY 1981 Hydro Applications
by Applicant Type, Number Sites

	Permit Applications			License Applications (New Capacity)		
	Received	Issued	Completed	Received	Issued	Completed
Rural Electric Cooperatives	115	18	NA	6	1	NA
Public Power Agencies	674	233	NA	39	18	NA
Investor Owned Utilties	96	35	NA	5	9	NA
Industrial Utilities	98	35	NA	5	5	NA
Private Entrepreneurs	876	252	NA	50	5	NA
TOTAL	1,859	573	1,254*	105	38	75*
vs. No. Sites	1,200	573	810	(87)	38	55

*Applications issued, rejected, dismissed, or denied.

D

Exemptions issued / Denied during FY 81

Type of Applicant	Conduit Exemption		5 MW or Less	
	issued	R/D	issued	R/D
Rural Electric Cooperatives	0	0	0	0
Public Power Agencies	5	4	13	5
Investor owned Utilities 1/	0	0	4	5
Industrial Entities	0	1	3	3
Private Entrepreneurs 2/	2	2	20	22
Hybrids	0	1	0	1
Total	7	8	40	36
	15		76	

R/D - Rejected/Denied
1/ Already in power business
2/ Entering power business

Senator HUMPHREY. Since you are a technical expert, we are going to ask you for your expertise. Do you have any problems with the proposed reordering of priorities? I can't think of the word I want. In any case, I think you understand what I'm getting at. Will you comment on that aspect of the bill?

Ms. NYGAARD. From the administrative sense in implementing it?

Senator HUMPHREY. Yes. I notice that you have included some tables of the FERC workload. Can you give us any estimate on how the workload might be streamlined, how the frivolous activity might be eliminated?

Ms. NYGAARD. It's a little hard to say because we don't really keep tabs on owners versus nonowners. As you stated at the beginning, we have so many applications. We are really flooded.

Since half the sites have competition for them, it seems to me that, particularly where the eminent domain provisions of the bill would be rearranged, that might well slow competition somewhat; and to the extent that slowing competition reduces workload, then we would have a correlation.

Senator HUMPHREY. You think that this bill would result in reduced workload and a streamlining of FERC's operations?

Ms. NYGAARD. Yes; in the sense that I mentioned. We would have fewer applications. One thing that I did bring out in my testimony was that if the Commission has to make a call on whether the property interest is held by the applicant, we have to cross the bridge of whether we do it the same way as we do now on exemptions. Which is to say if there is an argument about it, do we toss it back to the State, or do we really try to make a ruling on it.

Senator HUMPHREY. In your interpretation of the Federal Power Act what factors is the Commission required to take into consideration in judging whose application is best suited to, quote, "serve and utilize in the public interest the water resources of the region"?

Ms. NYGAARD. That is, indeed, a broad mandate that the act sets forth, and the Commission, which up until recently didn't have that many applications, so it's a little bit of fresh snow that we are treading in, has essentially considered anything to be subject to analysis.

The problem that has arisen is that at the permit stage, where the nature of the plans is rather unrefined, it's been hard to select which elements might be dispositive. Very often the evidence is lacking to prove them conclusively, and short of entering into a hearing on fact issues, we have taken the approach that at the permit stage that assessment can't be made. That is why we fall back on some of the more procedurally oriented rules for awarding permits.

Senator HUMPHREY. Your testimony states that the Commission has not yet ruled on whether site ownership could be a dispositive factor in choosing between otherwise equally well adapted applications.

When can we expect that decision?

Ms. NYGAARD. Well, I really don't know when that would be scheduled for the agenda. I believe that's currently in the hands of the Commissioners as to when they wish to see that item.

Senator HUMPHREY. Do you have any idea at all when it is going to come down?

Ms. NYGAARD. No, sir; I really don't.

Senator HUMPHREY. How should the language of S. 2500 be changed to make it clear that enforceable legal obligations or options for the property are necessary to develop the site qualified for the applicable purpose?

Ms. NYGAARD. You mean how to best define ownership for the purposes of this amendment?

Senator HUMPHREY. Yes.

Ms. NYGAARD. Well, as stated it seems just fine. Actually in application the Commission would implement regulations to pinpoint a little bit. As I stated earlier, the analogy I draw is to the exemption program. We have had some experience in this area. I mentioned we can refine on that, but the main issue remains, will we try to make rulings on property rights, or will we send the parties to the appropriate state forum and then ask them to come back to us once that is settled.

Senator HUMPHREY. Your testimony states that S. 2500 would alter the municipal purpose from that of a tiebreaker to that of a rebuttable presumption.

Under what circumstances has FERC declined to give the right to develop to a competing municipal applicant?

Ms. NYGAARD. There have not been too many instances at the permit stage where a municipal tiebreaker has not held, and that is largely because of the nature of the permits, as I just mentioned. There have been a few cases where the dispositive showing could be made that one applicant could have the potential of developing a site better than any other applicant. For example, an applicant's ownership of an upstream dam that only he could allow to be flooded. It's a rare case.

Senator HUMPHREY. Your testimony is that the bill would substantially reduce competition in developing hydro sites, largely due to escalation of pricing and invoking eminent domain powers under section 21. How many licensees actually invoke eminent domain?

Ms. NYGAARD. I do not know. I will try to provide that for the record to the extent that we compile it.

Senator HUMPHREY. In the meantime, could you give us a general idea?

Ms. NYGAARD. Mr. Chairman, I believe in most instances when we are dealing with a new unconstructed project, eminent domain is used.

Senator HUMPHREY. In most you say?

Ms. NYGAARD. Yes.

Senator HUMPHREY. As you know, the Third Circuit Court of Appeals recently affirmed the decision of FERC to award a permit to a nonowner municipality based on the first-in-time rule cited in your testimony on page 2. Does this decision reflect the current policy of FERC?

Ms. NYGAARD. Mr. Chairman, it is my understanding that the case involved not a site owner, but the use of a Federal dam, and there were two State entities competing for it. So, the ownership aspect really did not come into play in the Commission's deliberations.

Senator HUMPHREY. As you know, there are many complaints about abuses of the municipal preference. Private developers, in some cases, are using the municipality's name on the top of their permit applications and claiming a municipal preference, and actually the private party is the one who is going to build and operate and benefit from the development. What is the Commission planning to do to discourage these abuses?

Ms. NYGAARD. In the Commission's decision some months ago it set forth its basic policy on this, namely that largely because of staff resource problems, and the fact that arrangements could be changed before the actual license application was filed, they would not, at the preliminary permit stage, seek to investigate contractual arrangements of municipal applicants and private parties.

Under the Power Act, if people try to abuse the municipal preference arrangement, by the time of licensing that arrangement would have to come to light. If there had been a misuse of the municipal preference, that would also come to light and the Commission could react accordingly.

Senator HUMPHREY. Are you saying essentially that there is no problem?

Ms. NYGAARD. We are saying there may be a problem, but if we sought to investigate and cure the problem at the permit stage, it would be a wasted effort because everyone could rearrange their chairs around the table by the time it came back for licensing.

Senator HUMPHREY. In the same regard at the licensing stage, have you thrown any out?

Ms. NYGAARD. No, because this whole situation is rather new and most of the action now is at the permit stage. Very soon we will all be gathering around at the licensing stage trying to meet these problems as they arise.

Senator HUMPHREY. We will be submitting additional questions in writing.

One last question. I note that some of the testimony—I am not sure it's in yours—and I did read your testimony, and thank you for submitting it early enough to permit that—some are complaining about language of the bill not making it clear whether these provisions apply to relicense. What is your opinion on that?

Ms. NYGAARD. Yes, I did mention in my testimony that although the implication was there that it would not apply. The drafters might want to consider making that explicit to avoid any confusion.

Senator HUMPHREY. Thank you very much.

Our next witness is Mr. Richard Verney, chairman of the Monadnock Paper Mills. Good morning, Mr. Verney.

STATEMENT OF RICHARD G. VERNEY, CHAIRMAN, MONADNOCK PAPER MILLS, INC., BENNINGTON, N.H., ON BEHALF OF THE AMERICAN PAPER INSTITUTE, ACCOMPANIED BY JOHN T. FERGUSON, LEGISLATIVE COUNSEL, GEORGIA-PACIFIC CORP.

Mr. VERNEY. Good morning. The way I would like to proceed is to read a summary of my testimony.

I am Richard G. Verney, chairman and chief executive officer of Monadnock Paper Mills, Inc. With me is John T. Ferguson II, legislative counsel for Georgia-Pacific Corp.

I would like to thank you, on behalf of the members of the American Paper Institute whom I represent today, for the opportunity to testify concerning S. 2500.

The American Paper Institute is the national trade association of the pulp, paper, and paperboard industries. The 175 members of API, producers of some 90 percent of the Nation's pulp, paper, and paperboard, are major users of electricity. For many years we have met a portion of our electricity needs through the operation of hydroelectric projects which are often an integral part of our pulp and paper operations. Last year, with well over 400 megawatts of installed hydroelectric capacity, the paper industry produced over 2 million kilowatt hours of electricity using hydropower.

The paper industry has the ability to expand significantly the use of hydropower to meet the electricity needs of the Nation. The forest products industry owns approximately 68 million acres of land which contains valuable hydropower resources.

The members of API now hold 23 preliminary permits and have at least 17 license and 15 preliminary permit applications pending for projects to develop these resources.

The benefits of expanded hydropower development by the paper industry could be realized relatively quickly. The recent survey of the members of API reveals that given the suitable regulatory environment, our industry could increase its installed hydropower capacity by some 40 percent within 5 years.

S. 2500 is a major step toward establishing the regulatory environment which is needed if we are to make the rapid progress in our efforts to develop the Nation's hydropower resources. The reforms in Federal law which would be made by S. 2500 would reduce licensing and other delays in project construction. In addition, the bill would effect a desirable new balance in Federal policies regarding private property and energy development.

The site owner preference provision of the bill would expedite development of hydropower in the United States by reducing licensing delays to FERC. In our view, S. 2500, if enacted, will reduce, if not eliminate, the current incentive to file applications for the purpose of staking a claim to potential hydropower sites. As a result, fewer applications will be filed. Those which are filed will be better prepared and the administrative burden which the Commission now faces will be reduced.

Delays in project construction should also be reduced by S. 2500. Site owners who would enjoy a preference for the development of the site which they own will generally be the parties most familiar with those sites, and can develop them without having to resort to litigation to obtain the property needed for the project.

It is important to note that a site owner would not be able to use his preference to hinder hydropower development since he would have to develop the site to avoid losing it.

We would encourage you, as we did in our testimony before the subcommittee last fall, to seek to establish a relicensing preference for licensees. The lack of such a preference has hindered the up-

grading of some existing projects under licenses which are due to expire soon.

Evaluation. The paper industry endorses section 5 of S. 2500 which would establish, and I'm using your words, the traditional measure of damages to eminent domain proceedings for any condemnation under the Federal Power Act.

We have suggested in our written statement a minor change in the language of section 5 to insure that the courts do not disregard the value of the potential site as a hydropower site when fixing damages as part of a condemnation proceeding.

The substantially superior standard. We would oppose the inclusion in the bill of the substantially superior standard which is prescribed for use by the FERC in deciding between competing applicants, one of which is entitled to a preference.

This provision of the bill would introduce new uncertainties in the permitting and licensing process, and could well start litigation over the question of how superior is substantially superior.

The bill, as now written, could introduce internal inconsistency into the Federal Power Act. Section 10 of the act currently requires that any project licensed by the Commission be the "best adapted" project. We urge you to amend S. 2500 so as to require the FERC to administer the new preference system created by the bill in the same manner as the municipal preference is now administered.

In other words, an applicant eligible for a preference should be accorded a preference so long as his plans are as well adapted as the plans of any other applicant for the development of the water course in question.

Before closing, I would urge you to amend S. 2500 or introduce new legislation to increase the ceiling on exemptable projects from 5 megawatts to 15 megawatts. Such a change in the exemption program would yield enormous savings in the FERC processing, and would speed hydropower development without detrimental consequences.

We appreciate the opportunity to appear before the subcommittee today. In addition, we appreciate the time and interest which the members of the subcommittee have devoted to the advancement of the legislation designed to make much needed changes in the Federal Power Act.

We strongly support your effort to enact S. 2500 into law with the minor changes which we suggested today.

Senator HUMPHREY. Thank you very much.

[The prepared statement of Mr. Verney follows:]

TESTIMONY

OF

RICHARD G. VERNEY

Chairman, Monadnock Paper Mills, Incorporated

Before The

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBCOMMITTEE ON ENERGY REGULATION

July 22, 1982

Chairman Humphrey, members of the subcommittee, I am Richard G. Verney, Chairman and Chief Executive Officer of Monadnock Paper Mills, Incorporated. With me is John T. Ferguson, II, Legislative Counsel for Georgia-Pacific Corporation. I would like to thank you, on behalf of the members of the American Paper Institute whom I represent today, for the opportunity to testify concerning S. 2500.

The American Paper Institute (API) is the national trade association of the pulp, paper and paperboard industries. The 175 members of API, producers of some 90% of the nation's pulp, paper and paperboard, are major users of electricity. For many years, we have met a portion of our electricity needs through the operation of hydroelectric projects which are often an integral part of our pulp and paper operations. Last year, with well over 400 megawatts of installed hydroelectric capacity, the paper industry produced some two million kilowatt hours of electricity using hydropower.

The paper industry has the ability to expand significantly the use of hydropower to meet the electricity needs of the nation. The forest products industry owns approximately 68 million acres of land which contain valuable hydropower resources.

The member companies of API are actively pursuing the development of those resources. A recent survey revealed that API members hold at least 23 preliminary permits and have at least 17 license and 15 preliminary permit applications pending at the Federal Energy Regulatory Commission. The benefits of expanded hydropower development by the paper industry could be realized relatively quickly. The survey which I mentioned also revealed that, given a suitable regulatory environment, our industry could increase its installed hydropower capacity by some 40% within the next five years.

S. 2500 is a major step toward establishing the regulatory environment which is needed if we are to make rapid progress in our efforts to develop the nation's hydropower resources. The reforms in federal law which would be made by S. 2500 would reduce licensing and other delays in project construction. In addition the bill would effect a desirable new balance in federal policies regarding private property and energy development.

Several aspects of S. 2500 merit specific comment.

Site Owner Preference

First, S. 2500 would establish a preference in permiting and licensing proceedings for hydropower site owners. A number of witnesses who appeared before this subcommittee last fall outlined the need for and the benefits which would flow from the passage of legislation according a preference in hydropower development to the owners of hydropower sites.

98-140 O—82——3

The chief benefit which would be realized if a site owner preference were established is that hydropower development would be significantly expedited. This would occur for several reasons. The first is that licensing and permitting delays would be reduced. Commissioner Sheldon of the FERC has testified before this subcommittee concerning the flood of applications filed with the Commission within the last two years. While a large number of these applications represent a serious commitment by the applicants to develop the projects concerned, many of those applications represent nothing more than an effort to stake a claim to a potential hydropower site.

If the Commission were required to give preference to site owners, the number of applications (particularly those intended merely to stake a claim) filed with the Commission would in all likelihood diminish. In addition, the establishment of a preference for site owners should eliminate the current incentive to get the first application on file for a site. The result will be that applications which are filed will be better considered and more carefully prepared. This reduction in the number of applications filed with the Commission and improvement in the quality of the applications which are filed should result in quicker action by the Commission in granting the licenses and exemptions necessary to construct projects.

Another reason why a site owner preference would expedite hydropower development is that a site owner is generally the party best able to develop a site at the earliest possible date. By definition, a site owner controls the private property necessary to develop a project. Thus, the need to resort to what will often be extremely time consuming litigation to condemn the property needed for a project will be eliminated if the owner of a site is permitted to develop it.

I would like to address several arguments which might be made by any opponent of the site owner preference provision in S. 2500. The first is that the establishment of a site owner preference, rather than expediting hydropower development, will retard it. This objection to S. 2500 is, I believe, easily answered. A site owner preference would not permit an owner to "bank" potential sites without any intention to develop them. A licensing preference is nothing more than the term implies - a preference over any other party seeking to develop a site. A non-owner willing to proceed with the development of a site which for one reason or another will not be developed by the site owner would retain the ability, if S. 2500 were enacted, to obtain a license for the site and proceed with its development.

The quality of hydropower development would not suffer, as some might argue, if a site owner preference is established and competition for the right to develop sites is reduced. Section 10 of the Federal Power Act requires that <u>any</u> project licensed by the Commission be "such as in the judgment of the Commission will be <u>best adapted</u>" to improve and develop the waterway in question (emphasis added). Thus, even in non-competitive licensing proceedings, it is incumbent upon the Commission to license only such projects as will best improve and develop a water course.

Some may argue that S. 2500 would seriously undermine the ability of states and municipalities to develop hydropower projects. That argument lacks merit.

As you know, under section 7(a) of the Federal Power Act, states and municipalities now enjoy first preference (the so-called municipal preference) for the development of all hydropower sites. The municipal preference would continue

in effect if S. 2500 were enacted, however it would be operative with regard to a privately owned site only if the site owner did not seek to develop his site.

The loss of the current municipal preference over site owners under section 7(a), while objectional perhaps to some states and municipalities, would in reality have little if any effect on their ability to undertake hydropower development. Each of the states has, as an inherent attribute of sovereignty, the authority to take real property by condemnation. This power of eminent domain extends to hydropower sites as it does to any other privately owned property. Municipalities may, as the delegate of a state, exercise the power of eminent domain. Thus, states and municipalities enjoy a de facto preference over private parties with regard to hydropower development which is wholly independent of the municipal preference contained in section 7(a) of the Federal Power Act. This de facto municipal preference would not be affected in any way by S. 2500.

Moreover, the preference enjoyed by states and municipalities by virtue of their state eminent domain powers also extends to licensed projects. Section 14 of the Federal Power Act reserves to states and municipalities the power to take over privately owned licensed projects by condemnation at any time.

I realize, Mr. Chairman, that your bill does not address the subject of a preference for licensees when their licenses expire. API testified before your subcommittee last fall concerning that subject. It is an issue which continues to be of great concern to those companies now operating licensed projects and is one which we would strongly urge you to take up, if not in S. 2500, in further legislation.

Definition of Site Owner

For purposes of the licensing and permitting preference created by S. 2500, a site owner is:

> any person who has the property interests necessary for the development of the proposed project, exclusive of any such property interests owned by Federal governmental entitites and exclusive of any property interests necessary for a transmission line right-of-way....

We would urge you also to exclude state owned property interests from the property interests which a site owner must hold in order to qualify for a preference.

There are instances in which a private party owns sufficient property at the site of a state owned dam to develop a hydropower project. In the event that the state owner of the dam does not have an interest in developing a water power project there, the same reasoning which supports the owner preference provision now included in S. 2500 would support the granting of a preference to the party who owns everything necessary to develop a project except the state dam. We would be happy to provide you with legislative language to accomplish the change which I have proposed. This language which would not jeopardize the ability of a state to develop hydropower projects at state owned dams.

Exemptions

Since the passage of the Federal Water Power Act of 1920 (now Part I of the Federal Power Act), the Commission has had authority to exempt small hydropower projects from some federal regulatory requirements. Section 10(i) of the Federal Power

Act authorizes the Commission to exempt minor parts of projects and complete projects of not more than 2,000 horsepower from many requirements of the Act.

In 1978, and again in 1980, the exemption authority of the Commission was expanded. Section 213 of the Public Utility Regulatory Policies Act of 1978 authorized, but did not require, the Commission to exempt from Part I of the Federal Power Act certain conduit hydroelectric projects of 15 megawatts or less. Section 408 of the Energy Security Act, enacted in 1980, again authorized, but did not require, the Commission to exempt any hydroelectric project of 5 megawatts or less capacity from Part I of the Federal Power Act.

The Commission's exemption authority under existing law is entirely discretionary. This authority would remain discretionary if S. 2500 were enacted. Therefore, we question whether S. 2500 would truly "codify" the existing FERC exemption program as the bill apparently is intended to do.

Since we do not believe that the exemption provision contained in sections 2 and 4(a) of S. 2500 would change the purely discretionary nature of the FERC's powers with regard to exemptions, and because we see problems with the "substantially superior" standard which FERC would be required to use in issuing exemptions (problems which will be addressed below) we would recommend that sections 2 and 4(a) be deleted from

the bill.

Although S. 2500 does not address the subject of the ceiling on projects eligible for exemptions, I would like, before leaving the subject of exemptions, to renew our request, made at the hearing jointly held last fall by this subcommittee and the

Subcommittee on Water and Power, that the ceiling on exemptible non-conduit projects be increased from 5 megawatts to 15 megawatts. Such a change in the current exemption program would yield significant savings in FERC processing time and would speed hydropower development without detrimental consequences for navigation or the environment.

Valuation of Hydropower Sites in Condemnation Proceedings

Since the United States Supreme Court decision of United States v. Chandler-Dunbar Water Power Company, 229 U.S. 53 (1913), the damages payable by a party condemning land for a hydropower project have not necessarily borne any relationship to the value of the condemned property as a hydropower site. While the rule of Chandler-Dunbar makes some sense with regard to the condemnation by the Federal government (and, perhaps, FERC licensees) of submerged lands, which are subject to a dominant servitude for navigation, the extension of that rule to uplands condemned for a hydropower site is, in our view, without justification.

As you noted, Mr. Chairman, when you introduced S. 2500, Section 5 of the bill would merely establish "the traditional measure of damages in eminent domain proceedings for any condemnation under the Federal Power Act." This is a much needed change in the Federal Power Act and one which we heartily endorse. The courts should not, when fixing damages, be permitted to disregard the hydropower site value of property condemned under the Federal Power Act for the specific purpose of developing a hydropower project.

We would suggest one addition to Section 5 of the bill which we believe would give greater assurance that the courts will determine damages in the manner which the bill contemplates. We would urge you to add the following language at the end of Section 5: "taking into consideration its value as a hydropower site."

The "Substantially Superior" Standard

We would oppose the inclusion in the bill of the "substantially superior" standard which is prescribed for use by the FERC in deciding between competing applicants, one of which is entitled to a preference. As written, the bill would require the FERC to favor an applicant entitled to a preference unless another applicant proposed a "substantially superior" project. Our opposition to this aspect of the bill is motivated primarily by the fear that it would introduce new uncertainties in the permitting and licensing process and could well spawn much litigation over the question, "how superior is substantially superior?"

Moreover, the bill as now written could introduce an internal inconsistency into the Federal Power Act. Section 10 of the Act currently requires that any project licensed by the Commission be the "best adapted" project. Section 10 would not be changed by S. 2500. However, the bill could be read to require the Commission in some cases to issue a permit or license to a preference applicant (e.g., site owner) even though he did not propose the best adapted project. For example, the bill would require the Commission to grant a license or permit to a preference applicant even though a competing applicant's plans were superior, albeit not substantially superior to the plans of the preference applicant.

We would urge you to amend S. 2500 so as to require the FERC to administer the new preference system created by the bill in the same manner as the municipal preference is now administered. In that case, an applicant eligible for a preference

would be accorded a preference so long as its plans were as well adopted as the plans of any other applicant for the development of the water course in question.

Conclusion

As I stated initially, We appreciate this opportunity to appear before the subcommittee today. In addition, we appreciate the time and interest which the members of the subcommittee have devoted to the advancement of legislation designed to make much needed changes in the Federal Power Act. We strongly support you in your efforts to enact S. 2500 into law with the minor changes which we have suggested today.

Senator HUMPHREY. We are glad to have Mr. Ferguson with us this morning, and I'll have some questions for him.

First, can you share with us some of the problems that you had with your own company involved in hydroelectric development in addition to its principal activity of manufacturing paper products? Can you tell us some real world problems that you had with the structure as it now exists?

Mr. VERNEY. The biggest problem I have is it seems recently the only people who are making any money are lawyers and I'm the one who is paying them.

We have developable property which we own. It's ours. And now with the uncertainty concerning owner's preference to determine development of one's property, it appears that I'm having to spend a fortune to protect my interest in land that I am ready and willing to develop from people who have no right or ownership of that property. To me it's simply a case of I'm having to buy my land twice which is a cost that I'd rather not incur, and also a cost that if I didn't have would make hydropower even more attractive in the sense that I'd have more cash to put in it.

I think that's my concern.

Senator HUMPHREY. Had you had problems with people you regard as speculators, people who file simply because there is nothing to lose?

Mr. VERNEY. Personally I'd say no. However, in my investigations we are aware that this practice is taking place in the State of New Hampshire. That because of the preference afforded the first person to file, people are just trying to stake claims on as many potential sites as they can.

If that first-to-file provision allows them, as I understand it presently does, a preference over existing site owners, I quite frankly feel that's unfair to the site owner if, in fact, he is desirous of developing it.

Senator HUMPHREY. Mr. Ferguson, will you elaborate on the contention or the suggestion that we should preserve the tie-breaker concept rather than apply a "substantially superior" test to the competing applications?

Mr. FERGUSON. Senator Humphrey, our concern there is twofold. First of all, we are concerned about the fact that the bill would introduce a new concept in the Federal Power Act. This concept of substantially superior, we don't know what that means. We don't think the Commission knows what that means. We think it's going to take a long time, perhaps 6 or 12 months of rulemaking, for the Commission to deal with this new concept. Then given the fact that the lawyers are quite involved in hydropower development, I wouldn't be surprised if it didn't take another few years in courts to figure out what does substantially superior mean, and that is not going to speed up the process. So, that is our first concern.

Our second concern is the fact that section 10 of the Federal Power Act tells the Commission one thing to insure that only the best adapted project is licensed. We think there might be a conflict if section 7 were amended as your bill would now do.

The Commission might be told two different things; license only the best adapted project in section 10, and in section 7 you've got to award the license to the preference applicant, even though there may be a competing application that is superior to that application.

We are not sure how the Commission would resolve that possible conflict.

Senator HUMPHREY. Well, the genesis of this provision in this bill is to address those cases where applicants have literally xeroxed an application of another person.

If you don't like our proposed solution to the problem, do you have a proposal of your own to eliminate that kind of activity?

Mr. FERGUSON. We would be perfectly happy with the type of preference that now exists for municipalities. We think the Commission can deal with the xeroxing under that approach to a preference. A xeroxed application wouldn't be better adapted than the preference applicant's application.

Senator HUMPHREY. Will you give us your opinion on the issue of whether this bill would apply to relicensing and if you have a problem with that proposed solution?

Mr. FERGUSON. My interpretation of the bill is it would eliminate all preferences of relicensing.

Senator HUMPHREY. So, you want it?

Mr. FERGUSON. To the extent that the municipal preference would be eliminated in licensing, we think that is a grand idea. We would like the bill to be written in such a way that the owner preference, or something very similar to that, a licensee preference, would apply.

As we read the bill now there would be no preference in relicensing.

Senator HUMPHREY. Mr. Verney, I'd like to flush out the record a little more fully, if possible, on the real world difficulties that owner-developers such as yourself have had.

Can you give us, if you don't mind—I know you are here representing the institute and not your own business—but since you have had practical experience in this regard, can you tell us some-

thing about your company's involvement in hydro? What facilities you have developed, to what potential sites you have that you are thinking of developing and so on, what problems you've encountered in the process?

Mr. VERNEY. Presently, and for a number of years, we have been generating hydropower which we use internally. We have excess power. We have a contract and we sell it to a public service company in New Hampshire.

Basically we have five turbines. We have two dams, each of which has two turbines, and we have a turbine in the mill. The installed capacity is somewhere around 2 megawatts.

We also have, above the first generating end, an existing dam which we are contemplating to develop. I think the problem here is, again, we not only own the dams, we own the property all around it and the water rights.

What I am involved in now is with the undeveloped site, having to spend, as I pointed out earlier, a great deal of time and money and hire consultants who know the ins and outs of how to apply for a license when really I don't think I should have to go through all of this at this point to protect property which I already own, which is an integral part of the generating facilities that I already have, and potentially a situation that could increase the power that we are now producing.

Also, for a layman, the complexities of dealing with FERC are beyond me. As I say, we either have to hire the consultants to prepare the draft permits and finding out what we do.

I guess from the small company's point of view, you have to spend a great deal of time and money to protect that which you already own and are interested in developing.

Senator HUMPHREY. Thank you very much for your testimony. We will have some questions in writing.

Mr. VERNEY. We appreciate the opportunity to testify.

Senator HUMPHREY. Our next witness is Mr. Larry Hobart, deputy director of American Public Power Association.

STATEMENT OF LARRY HOBART, DEPUTY DIRECTOR, AMERICAN PUBLIC POWER ASSOCIATION, ACCOMPANIED BY ALLAN RICHARDSON, LEGISLATIVE DIRECTOR AND COUNSEL, APPA

Mr. HOBART. Good morning, Mr. Chairman. I am here today accompanied by Allan Richardson, APPA's legislative director and counsel. I would appreciate the inclusion of my full statement in the hearing record.

There are three main points I would like to emphasize today, and I would like to comment on some of the statements made by previous witnesses that might help get to the points that you are interested in.

The American Public Power Association is a national service organization serving some 1,700 publicly-owned utilities in all parts of the United States, including the State of New Hampshire.

APPA does not support S. 2500 and I would like to give three or four reasons why we think the bill is, perhaps, deficient.

First, APPA does not believe that enactment of S. 2500 would advance its stated purposes, which are to reduce conflicts in the li-

censing of hydroelectric powerplants, to expedite development of hydropower, and to simplify regulation of hydro facilities.

Conflicts could well be enhanced by the introduction of the new statutory concepts of "property exemption applicant," "property interests necessary for the development of the proposed hydroelectric project," "substantially superior," and "highest and best use." In all cases, these concepts appear to pit property owners against water users in administration of the Federal Power Act; in addition, several witnesses have already commented, and you brought out ourself in questioning, the bill would apparently eliminate existing law on relicensing.

Expedited development might be significantly short-circuited by property owner desire to block or minimize full utilization of specific sites, and the elimination of the comprehensive plan test contained in section 10(a) of the Federal Power Act would, again, be regarded as adverse to expedited development from our point of view.

Application of S. 2500 to all pending exemption, permit, and license applications would clearly throw into confusion both the applicants and FERC administrators.

We think simplification of regulation is unlikely to be advanced by creation of a new class of property owner exemptees, permittees, and licensees to be covered by the provisions of the Federal Power Act.

Second, APPA interprets S. 2500 to be a step away from the wise water utilization policies of existing law which encourages competition in the creation of a comprehensive development plan.

Under the bill, property owners would be given a priority over all other applicants for exemptions, permits, and licenses and simultaneously released from existing responsibilities to advance a plan which is "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes." You will recognize that I am quoting from section 10(a) of the Federal Power Act.

Plans of privileged property owners would give way only to plans of others which are "substantially superior." "Substantially superior" is a standard which is not defined in the bill, but which means something more than equally well adapted, thus encouraging underutilization of sites by decreasing the degree of competition a property owner might expect under present law.

S. 2500 could make some potentially useful projects uneconomic. The price for property acquired by a licensee to construct a hydroelectric project would be increased by imposing a Federal requirement that compensation accorded under section 21 of the Federal Power Act be based on "the highest and best use" to which the property may be put—although this standard is not defined in the bill and could be contrary to the Federal Power Act's directive that eminent domain proceedings "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." Condemnees are entitled to just compensation, which has been defined as the

fair market value of the property as of the date of taking but does not include windfall profits.

Running water in natural streams is not property, and part I of the Federal Power Act is not based on property concept. Use of land is, of course, required for development, but the act provides that a successful license applicant can acquire necessary rights "in conjunction with an improvement which, in the judgment of the Commission, is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" where contracts or pledges are inadequate.

In recent times, Congress has reinforced the pro-development features of the Federal Power Act and modern economic incentives by passage of the small hydroelectric power projects loan program contained in title IV of the Public Utility Regulatory Policies Act of 1978, the buy-sell interconnect provisions of section 210 of PURPA, and authorization of earmarked tax benefits and regulatory streamlining at the Federal Energy Regulatory Commission.

Third, APPA believes that there are sound reasons to support a preference for hydropower utilization requests of public agencies.

Under existing law, States and municipalities are given preference in the issuing of permits and licenses providing that their plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region." This has been the law for more than 60 years. Today, there are nearly 80,000 units of government in 50 States, most of whom can benefit from this provision of section 7(a) of the Federal Power Act. The reasons for this fact have strong policy underpinnings.

Granting of development rights to a public agency (a) insures that a public purpose is to be served, (b) identifies a community of citizens who will be assisted, and (c) provides for nonprofit distribution of the benefits. This later point was regarded as important by the authors of part I of the Federal Power Act, who specified in section 10(e) that "licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipalities for State or municipal purposes."

Mr. Chairman, those are the three principal points I wanted to leave you with in this hearing, but I would like to comment briefly on some of the other points that have already come out in today's hearing.

APPA is sincerely interested in the elimination of the sources of delaying the Federal Power Commission in licensing of hydroelectric facilities, as any other group of potential applicants for licenses and permits might be in the United States. However, we do not think, as I indicated, that S. 2500 as it is drafted would achieve that aim. We are equally interested in preventing the kind of situation which you described as a front municipal which is serving as a cover for private development. And in helping the Commission to develop their existing rules, we have repeatedly stressed that we believe pure municipal systems or State agencies would be the beneficiary. In no way should they be allowed to shield or assist a nonpublic agency in the development of a project. I think we share

with you a little bit of frustration about the Commission's methodology in tackling that problem. We're not quite as convinced that it is useful to wait until the licensing stage to make a determination as to who is phony and who isn't. The problem is that a lot of time, effort and money are expended in the intervening period. If we come down to the license application itself before that decision is made, all of that effort is going to be thrown out the window.

It's equally important to the nonapplicant in this situation because assuming the existence of a preference, those potential users of the water resource might well sit back, assuming they haven't made the grade, and then find out at a much later date that the field was still open and all that time was lost.

We think the Commission has a positive responsibility to investigate claims of fronting an application for preference. We would encourage you to pursue that with the Commission in the hopes that the verifiable claims can be looked into by the Commission and some action taken at an early stage.

We think, if I understood your statements to an earlier witness correctly, that it is certainly inappropriate and not in accord with the Federal power provisions if agencies within the State of New Hampshire, for instance, have been unable to secure their preference in the licensing of hydroelectric projects. Clearly the law is theirs. I can only conclude that if a State agency or municipality has not been successful, it's because they've really failed to exercise those rights, although you are more familiar with local situations.

Knowing you were going to be chairing this hearing, we examined some of the recent filings in the State of New Hampshire as shown in the printouts available to us from the Federal Energy Regulatory Commission. I would offer them for the record and for your perusal. I have a table showing applications for hydrolicenses pending as of July 7, a table of applications for hydro permits pending as of the same date, and another table showing hydro permits in effect as of that same date. You can see that there is a lot of interesting hydroelectric development in the State of New Hampshire. I think you'll also find the applications and existing permits are those of nonpublic agencies.

You have some cities in New Hampshire that have filings, or hold permits, and you have some water resources boards also in this picture, but the bulk of these findings come from hydro parties, manufacturers, developers, and individuals. And it appears they are not competing here to make these filings.

The relicensing question raised in the bill is something that we have discussed with staff, and it is my understanding that it is not an attempt on your part to wipe out relicensing. I would simply reiterate our position as expressed in our statement that a relicensing provision established in the Federal Water Power Act of 1920 is as valid today as it was then. Its purpose is to insure that a water resource is not a property right to be held by individuals, but a national resource that belongs to all of us, and will be available for reallocation and in the same terms that applied when the original license was granted.

You asked the witness from the Federal Energy Regulatory Commission whether the bill might cut away some of the paperwork and some of the number of individual filings to the Commission.

Her answer, as I understood it, was yes that was possible because that might chill competition. We didn't regard the chilling of competition as a good policy goal. In fact, our view would be that the competition for permits and licenses for hydroelectric projects is a good thing, because coupled with the standard for tests of comprehensive development, it could mean public resources are going to be most effectively utilized. We do not think the role of the Congress in looking at the Federal Power Act should be to cut back on competition. We think that the change in the evaluation standard from "equally well adapted" to "substantially superior" is a mistake. I think in this respect, if I understood the testimony of the American Paper Institute, we are in accord, probably for the same reason that it will reintroduce a note of confusion and difficulty, and grant litigation which will extend over a period of time until everybody figures out what's being talked about.

I should mention in connection with the condemnation question which you also raised, that while such authority goes with the license, it is my impression from conversations with our members that condemnation is not a route that is frequently employed in getting the necessary property rights to implement a license once it is granted. The condemnation takes place and condemnation is a power which could be applied. Furthermore, I would point out in connection with the municipal activities, that left to themselves in advance of securing a license there are certainly limitations on municipalities as to who they can condemn and under what conditions.

I don't think it would be your intent, although the bill may move in this direction, to encourage speculative marketing properties that might be developed for hydroelectric purposes, but I cannot help but think in reading the provisions of the bill that that might well be the result. And rather than dimishing the frenzy of activity we've seen lately, the bill could actually enhance it by specutative purchases based on the anticipated benefits by hydroelectric development.

That summarizes the points we would like to make.

[The prepared statement of Mr. Hobart follows.]

STATEMENT ON S. 2500
SUBMITTED TO SENATE SUBCOMMITTEE ON ENERGY REGULATION
BY LARRY HOBART, DEPUTY EXECUTIVE DIRECTOR
AMERICAN PUBLIC POWER ASSOCIATION

July 22, 1982

My name is Larry Hobart. I am Deputy Director of the American Public Power Association. APPA is a national service organization representing the interests of more than 1,750 local publicly-owned utilities in 48 States. At its 1982 annual conference, APPA members passed the attached resolution in opposition to S. 2500. The Association does not support the legislation for the following reasons:

1. APPA does not believe that enactment of S. 2500 would advance its stated purposes, i.e. "to reduce conflicts" in the licensing of hydroelectric powerplants, "to expedite development" of hydropower, and to "simplify" regulation of hydro facilities.

Conflicts could well be enhanced by the introduction of the new statutory concepts of "property exemption applicant", "property interests necessary for the development of the proposed hydroelectric project", "substantially superior", and "highest and best use" which pit property owners against water users in administration of the Federal Power Act, in addition to apparently eliminating existing law on relicensing.

Expedited development might be significantly short-circuited by property owner desire to block or minimize full utilization of specific sites and the elimination of the "comprehensive plan" test contained in Section 10(a) of the Federal Power Act. Application of S. 2500 to all pending exemption, permit, and license applications would clearly throw into confusion both applicants and FERC administrators.

Simplification of regulation is unlikely to be advanced by creation of a new class of property owner exemptees, permitees, and licensees to be covered by the provisions of the Federal Power Act.

2. APPA interprets S. 2500 to be a step away from the wise water utilization policies of existing law which encourages competition in creation of a comprehensive development plan.

Property owners would be given a priority over all other applicants for exemptions, permits, and licenses and simultaneously released from existing responsibilities to advance a plan which is "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."

Plans of priviledged property owners would give way only to plans of others which are "substantially superior" -- a standard which is not defined in the bill but which presumably means something more than "equally well adapted" -- thus encouraging under-utilization of sites by decreasing the degree of competition a property owner might expect under present law.

S. 2500 could make some potentially useful projects uneconomic. The price for property acquired by a licensee to construct a hydroelectric project would be increased by imposing a Federal requirement that compensation accorded under Section 21 of the Federal Power Act be based on "the highest and best use" to which the property may be put -- although this standard is not defined in the bill and could be contrary to the Federal Power Act's directive that eminent domain proceedings "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated". Condemnees are entitled to just compensation, which has been defined as the fair market value of the property

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as of the date of taking but does not include windfall profits.

Running water in natural streams is not property, and Part I of the Federal Power Act is not based on property concept. Use of land is, of course, required for development, but the Act provides that a successful license applicant can acquire necessary rights "in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce" where contracts or pledges are inadequate.

In recent times, Congress has reinforced the pro-development features of the Federal Power Act and modern economic incentives by passage of the small hydroelectric power projects loan program contained in Title IV of the Public Utility Regulatory Policies Act of 1978, the buy-sell-interconnect provisions of Section 210 of PURPA, and authorization of earmarked tax benefits and regulatory streamlining at the Federal Energy Regulatory Commission.

3. APPA believes that there are sound reasons to support a preference for hydropower utilization requests of public agencies.

Under existing law, States and municipalities are given preference in the issuing of permits and licenses providing that their plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region." This has been the law for more than 60 years. Today there are nearly 80,000 units of government in 50 States, most of whom can benefit from this provision of Section 7(a) of the Federal Power Act. The reasons for this fact have strong policy underpinnings.

Granting of development rights to a public agency (a) insures that a public purpose is to be served, (b) identifies a community of citizens who will be assisted, and (c) provides for non-profit distribution of the benefits.

This later point was regarded as important by the authors of Part I of the Federal Power Act, who specified in Section 10(e) that "licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipalities for State or municipal purposes...."

High fuel prices have become a driving force in utility economics -- around 40% of delivered cost in a coal-fired utility. The inflation-proof "fuel" -- falling water -- looks very good to many public agencies now in the power generation business, and systems which do not now generate also find it prudent to examine hydropower because the same high fuel costs are showing up in their wholesale rates (up 337% in the last 10 years).

Small-scale hydroelectric projects have special appeal for local public power systems since most of them are located in small communities. A low-head hydro development may be the "appropriate technology" for such towns, which frequently prize the virtues of local control and self-help.

In addition, small-scale hydro projects recommend themselves because of their relatively short construction lead-time with known techniques; potential long plant life; possible decreased transmission requirements; multiple-purpose character fitting in with other local needs, such as water supply, flood control, irrigation, recreation, wildlife enhancement or navigation; environmental advantages stemming from lack of air and water pollution from noxious gases and heat dissipation; elimination of transportation and storage of fuel and combustion waste; minimum manpower requirements and opportunities for remote control; and low outage rates and high reliability. (Small-scale hydroelectric projects also have some disadvantages, including the fact that they do not provide economies of scale; are site specific and not easily accessible to all communities; and may supply intermittent capacity and energy which does not match load.)

It is perhaps useful to consider why we have Part I of the Federal Power Act, which was originally enacted as the Federal Water Power Act of 1920. Prior to that time, it was the practice for Congress to grant rights to private parties for use of streams and rivers to generate electricity. However, Presidents Theodore Roosevelt, William Howard Taft, and Woodrow Wilson, and other governmental leaders in the Congress and the States, found that this procedure was objectionable on a number of grounds, including the facts that it (a) resulted in a monopolistic ownership of a national resource, i.e. flowing water, contrary to the public interest; (b) provided unconditional rights at no charge to private parties in perpetuity; and (c) incorporated no guards against non-development or underdevelopment of the potential of particular projects.

The basic scheme put in place in 1920 was designed to encourage use of waterpower -- for many of the same reasons that we would apply today. For instance, it was recognized that of four major natural energy sources identified at that time -- coal, oil, gas, and water -- the first three are finite while water is renewable.

The development of the power potential of the nation's rivers began attracting increasing attention toward the end of the nineteenth century. Private power companies lobbied Congress intensively for permission to build power plants on public lands and navigable waterways. Congress authorized the first non-Federal hydroelectric power development in 1884. Over the course of the next twenty years, an additional ten private projects were authorized by Congress. However, in 1903, President Theodore Roosevelt reasserted the government's right to control the development of water-related resources by vetoing a bill which would have permitted the construction of a dam and power station on the Tennessee River at Muscle Shoals, Alabama, by N.F. Thompson

and Associates, a private corporation. Roosevelt spoke strongly against a private water power development, and called for a comprehensive study on the issue.

Roosevelt's forceful arguments that public water resources would be developed for the public benefit finally were successful in 1906, when Congress passed the Town Sites and Power Development Act granting a preference for municipal purposes in the use of surplus hydroelectric power generated by Federal irrigation projects. In the years that followed, President Roosevelt and Taft vetoed bills which would have permitted private power projects on the Rainey, James, White and Coos Rivers.

The battle between those who favored private development of power and those who advocated public projects continued through the early part of the twentieth century. The Raker Act of 1913, which provided the city and county of San Francisco and other municipalities and water districts with a right of way over public lands for the construction of aqueducts, tunnels and canals for a waterway, provided that grantees of the right to develop water and electric power could not sell or lease those rights to any corporation or individual other than another municipality, municipal water district or irrigation district. The Act also contained an absolute prohibition on the transfer of the rights to any private person, corporation or association, and provided for the reverter of the rights to the United States in the event of such a transfer. However, opponents of public preference power, and most notably, investor-owned utilities in the area, managed to prevent a significant amount of the power generated by the water projects from being sold to preference entities. Public outcry, Congressional investigations and even a court injunction were unsuccessful in freeing the power for preference customers for nearly fifty years.

In later legislation, Congress adopted a more flexible approach to the

issue of the dispositon of Federally generated power. It relaxed the requirement that preference power must be used only for specified purposes, as found in the Town Sites Act and the Raker Act, and adopted the technique of granting preferences to those governmental bodies, organizations and corporations which were organized for the public benefit, without limiting the uses to which the power could be put. The first statute to grant a preference to a particular class of uses, the Federal Water Power Act of 1920, provided that the Federal Power Commission give a preference in the award of licenses for hydroelectric plants to states and municipalities, provided that those licensees would serve the public interest as well as would non-preference licensees.

Since that time, the preference principle has been adopted in a host of other Federal statutes affecting electric power including the Tennessee Valley Authority Act, the Rural Electrification Act, the Bonneville Project Act, the Reclamation Act of 1939, and the Flood Control Act of 1944.

The preference clause represents a decision to use in a particular manner resources which are owned by the people of this country and held in stewardship on their behalf by the Federal government. The United States has made a number of choices as to how its resources would be developed and utilized. From the days of more than a century ago, when Congress approved grants for railroad rights-of-way, to the present, when it decides the terms upon which national park and forest lands shall be used, a few basic principles have governed. Probably the most significant is that the use of public resources for private gain will be countenanced only if there is a larger public purpose to be served.

Thus it was perceived that the economic benefit accruing to private corporations owning railroads as a result of the grant of rights-of-way would be more than offset by the benefits to be realized by the Nation as a whole that would flow from the expansion of a transportation system across the continent.

Similarly, the Congress decided that it would permit the potential hydroelectric power in its rivers to be developed by private companies, since the public benefits to be derived from flood control and electrification would warrant allowing privately owned profit-making companies to use public resources. However, Congress also expressed a desire that the benefits of public resources flow directly to the public, whenever it was possible that they do so, by including in the statutes providing for the grant of hydroelectric facility licenses an explicit preference to state and local governmental entities.

The principle that public resources should benefit private corporations only where no other alternative consistent with the public interest could be found was expressed in the so-called "preference clause" in the Federal Power Act. The "preference clause" is not so much a decision to favor one type of utility over another as it is a decision to let the nation's resources, in the form of electrical energy generated in hydroelectric plants, be distributed directly to the nation's people wherever possible. The preference clause rests upon the following basic concepts: (a) the power generated at dams on navigable waters is owned by the public and the flowing water is a natural resource which is owned and controlled by governmental authority; (b) useful social purposes are served by ensuring that the benefits of public projects go directly to the people through non-profit governmental institutions; (c) the electric utility industry, because its physical characteristics tends toward a monopolistic structure, and the Nation is best served if there are varied forms of ownership since the abuses present in any monopoly system are thus reduced or eliminated; (d) local governmental utilities are in general smaller than privately owned companies, and their reliance on power purchased from private companies should be reduced by making available to them opportunity to generate at appropriately-sized hydro sites; and (e) local control over power distribution is a worthwhile goal that the preference clause promotes.

Here are some more detailed points APPA wishes to make about S. 2500:

1. APPA thinks S. 2500 moves too far in the direction of abdicating to the riparian property owner the Federal government's responsibility for the development of hydroelectric power in the national interest. This would be a result at odds with the fundamental precept of Federal government control over its navigable streams.

It has long been established that the riparian owner has no interest in the flow of a navigable stream; rather that flow, including its water power value, is dedicated to the Federal government under the Constitution's commerce clause.

2. The bill would give preference to "qualified exemption applicants" over license applicants who hold preliminary permits.

The bill would replace the existing Section 7(a) of the Federal Power Act with new subsections (a), (b), and (c), establishing a new 3-tiered preference scheme under the Act. The proposed new Section 7(a) would give a "qualified exemption applicant" preference over any other applicant for an license or preliminary permit. ("Qualified exemption applicant" is defined elsewhere as any exemption applicant which has all of the property interests necessary to develop the proposed project, exclusive of any property interests necessary for a transmission right of way; projects on which Federal lands are involved do not qualify for this preference.) The only way to defeat this preference is for a license or permit applicant to prove that its plans are "substantially superior" to the plans of the qualified exemption applicant. Unless a permit or license applicant could show that its plans were substantially superior, the proposed Section 7(a) would award the project to the qualified exemption applicant even in cases where a license applicant has held a preliminary permit for the site. This would render nugatory the

the priority provided by a preliminary permit in cases where the proposed project is located entirely on non-federal lands. Needless the say, this new preference would also eliminate the public agency preference in such cases.

3. For a project involving partly federal and partly non-federal lands, the bill would seem to give preference to a license or permit applicant which owns any of the property interests necessary to develop the project.

4. Even to the extent the public agency preference is preserved under S. 2500, it is abrogated by the elimination of language allowing municipal applicants to make their plans equally well adapted to those of a competing non-municipal applicant.

The third tier of the new priority system is contained in proposed Section 7(c). In cases where the new preference provisions of subsection (a) and (b) are inapplicable, subsection (c) preserves the public agency preference. However, the language of the existing Section 7(a), which gives states and municipalities a "reasonable time" to make their plans "equally well adapted" to those of competing non-municipal license and permit applicants, is eliminated.

5. It is not clear that the bill preserves public agency preference in relicensing proceedings.

Although we have been assured by Senate subcommittee staff members that S. 2500 is not intended to affect the municipal preference on relicensing, as announced in FERC Opinion No. 88, the bill as introduced leaves this point far from clear. The language of the proposed new Section 7 would eliminate any reference to the state and municipal preference with respect to issuance of "new licenses" under Section 15. Section 6 of the proposed bill speaks to the effective time frame of the legislation. It states:

> This Act shall be applicable to any hydroelectric project which is not subject to Subsection (d) of Section 7 of this Act (concerning federal takeover) and with respect to which no preliminary permit, license or exemption has been issued by the Commission on the effective date of this Act.

It is not clear whether a project that is up for relicensing would be excepted from the new priority scheme under proposed Section 6. Arguably, in such a case a license might be deemed to have been "issued by the Commission on the effective date of this Act." However, this is a tenuous argument and it is possible that the ownership priority scheme could be applied in a relicensing situation. The section-by-section analysis of the draft section 6 does not clarify this issue. It states: "Permit, exemption or license applications pending on the effective date of the Act would be subject to the new rules. The amendments would not be applicable to those sites where a permit exemption or license has been granted by the FERC prior to the effective date of this Act..."

RESOLUTION
ON
MUNICIPAL PREFERENCE AND
PROPERTY OWNER LICENSE EXEMPTIONS

WHEREAS, Senator Gordon Humphrey (R-NH) has introduced a bill, S. 2500, to amend the Federal Power Act to restructure priorities for recipients of hydro permits and licenses and to change the method of calculating property values taken pursuant to eminent domain authority extended to licensees, and

WHEREAS, S. 2500 would eliminate the first right of public bodies to hydroelectric permits and licenses, and would discourage full development of water resources in the public interest by assigning priority to property owners, and

WHEREAS, S. 2500 would: (1) restate provisions of existing law under which exemptions from license requirements are granted to property owners for projects at existing dams with a capacity of 5 MW or less and for manmade conduits of 15 MW or less; (2) provide priority for property owners in receiving permits and licenses unless competing applications were clearly superior; and (3) provide preference for states and municipalities when in competition with nonproperty owners, and

WHEREAS, while designed to protect property owners, the bill as drafted would permit individuals with property interests such as rights of way, easements or leases to take precedence over municipal license applicants, and protection of such limited property rights is a totally inadequate justification for restructuring license priorities, and

WHEREAS, in providing preference to states and municipalities, the bill omits reference to relicensing situations, thus raising the possibility that the measure would eliminate the preference in relicensing, and

WHEREAS, with respect to eminent domain, the bill changes the traditional measure of damages from "fair market value" to "value based on the highest and best use" which would in some instances make uneconomic otherwise feasible projects, and

WHEREAS, preference in licensing for states and municipalities is a longstanding Federal principle adopted in, and still consistent with, the public interest;

NOW, THEREFORE, BE IT RESOLVED: that the American Public Power Association opposes S. 2500 and any attempt to destroy or modify the preference of municipalities in receipt of permits and licenses.

-- Adopted May 25 by the American Public Power Association at the 1982 Annual Conference held in New Orleans, Louisiana

Senator HUMPHREY. OK. Is there anything in this bill you like?

Mr. HOBART. We like your intent to speed up the licensing process. We like your intent to assure that conflicts are expeditiously handled, and we like your idea of simplifying. But after reading the purposes stated in the bill, we're not sure the words which follow would accomplish the job.

Senator HUMPHREY. What better alternatives do you have, or do you prefer to leave things as they are?

Mr. HOBART. If you're talking about elimination of delay, we have to look to the Federal Energy Regulatory Commission. I think that it has taken a number of steps to do exactly that. But key questions are: what does the preference clause mean in the permitting and licensing, and whether hybrids qualify for preference.

The Commission has answered those questions and now we know what the rule is. I think we've seen a diligent effort on the part of the Commission to handle the administrative workload. Within the past few days I was able to secure from the Commission a very detailed breakdown of all the applicants for permits and licenses at the Commission. I have now in great detail all the information which tells me the particular projects, the potential development anticipated, the dates of filings and all of the rest. By using computers, the Commission has got it well in hand.

The Commission is also to be commended for its attempt to speed up the process and apply the necessary resources to deal with what was the backload of projects. I think we should give them all the support we can and adequate appropriations to do the job. I think that's where the real responsibility lies.

Senator HUMPHREY. You think it's a management problem?

Mr. HOBART. That is correct.

Senator HUMPHREY. Does your organization have a policy toward hybrids?

Mr. HOBART. Our policy is basically a policy that was adopted by FERC. We believe the preference provision of the Federal Power

Act applies to a public agency when it is applying in its own name and its own right for a project. The association of a nonpublic agency for that project is less than the preference entity. Preference comes down on the side of a pure preference agency.

Senator HUMPHREY. Well S. 2500 would allow a municipality to become site owners either through negotiation or State eminent domain. Isn't this consistent with what you just said?

Mr. HOBART. No, I think I would reach another point if I could explain briefly. The Federal Power Act is really premised on the belief that it's desirable to use a resource which belongs to all the people in the United States to its fullest once the decision is made to go for development. The act is written to encourage parties to take a look at whether they could do that job best. For that reason I think those drafting the act, from my reading of the legislative history, believed that it was best not to compare them with the idea that they had to have a piece of paper showing property ownership or option rights when they appear to lay out their case for a plan. That's a rather practical thing if you believe that competition and what is the best use of the resource itself is a good idea. The alternative would have been to give a preference to those who presently have property rights. I think what the writers of the act contemplated was a much more open opportunity for competition than would be allowed if you gave that preference to property owners.

Senator HUMPHREY. Do you feel that public developers can serve the market better than the private?

Mr. HOBART. I don't think it's a question of whether the technical ability of the parties is necessarily different, but I think what a particular entity proposes to do with a work product is another matter. The act explicitly, and there is strong writings in legislative history, was designed to insure that a public resource was made available as a matter of first choice directly to the public and for that reason it was inserted into the provisions of the act. That purpose seems equally good today.

The interest of the State and municipality as a representative of a political community and constituencies within their boundaries are entitled to special treatment and they are given that in the act. That provision remains sound as far as we are concerned.

Senator HUMPHREY. Regarding your second point of objection, you state that condemnees are entitled to just compensation which can be defined as fair market value of the property but does not include windfall profits. Why shouldn't the fair market value include or take into consideration the use as a revenue producing hydroelectric site?

Mr. HOBART. Clearly it's going to take into account all those that relate to the value of the property.

Senator HUMPHREY. What are you suggesting as a windfall profit?

Mr. HOBART. What I'm doing is inferring from the words in the act a change which must have had a purpose. I assume that what was intended was to raise the value of the price being paid for the project, but what we're saying is this is a body of law that is developed over a long period of years. The constitutional requirement, the value questions, clearly enter into it, but they relate to pragmatic matters of what could you sell this property for if you had a

willing seller and a willing buyer. We believe that's sound. The idea of highest and best use introduces an additional element or at least labels one, and, to the extent that it goes beyond just compensation, we think it is uncalled for. These are as old as the Government and as you are well aware, there's a large body of law that relates to them. It works. People complain about the prices on both sides, the buyer and the seller. It is not a new and novel process. As I said earlier I don't think on the basis of my experience that condemnation is the usual route. Negotiation is, and clearly buyers will say whatever they think is useful in obtaining their price.

Senator HUMPHREY. What is it that you are terming as windfall profits? Can you be more explicit?

Mr. HOBART. It's a highly speculative value attached by property owners with little justification. To the extent that this altered standard is supportive of speculative pricing, we believe that it is more away from both logic and sensible approaches to arbitrating a difficult position.

Senator HUMPHREY. I'm not an attorney and I'm not well versed on the aspect of the laws. As you stated, it's a body of law built up over a long period of time. As a taxpayer and property owner in New Hampshire where you pay your taxes on the potential use of the land, it seems ironic. On the one hand a person would have to pay taxes on that basis, but chose to sell his property valued on a different basis.

Mr. HOBART. The fact is that entities who bargain for the public and may apply the condemnation law are the same people who set taxes and they're equally responsible to suggesting their being equitable or arbitrary or capricious. It is not unusual, to say the least, where condemnation exists to find a high controversy within a particular community. People who have the responsibility as policymakers and administrators to implement the law are not unaffected by those attitudes, and I assume that's true in New Hampshire.

Senator HUMPHREY. Let's take the case of someone who has a license. If someone has a license and is required to build in not more than 4 years a site that has pretty well proven its capacity at that point, how do you term that as a speculative situation?

Mr. HOBART. I'm not sure I followed your question.

Senator HUMPHREY. If a licensee is required to build within 4 years and you want to condemn what you call a fair market value on speculation and windfall profits, if someone has a license and is required to build and a person has a license and it's a good site, why are you suggesting there's a windfall profit involved? That's a pretty concrete value at that point.

Mr. HOBART. Yes, I would agree with that. I think the question becomes, if the entity has a license, obviously he has an obligation to build and then there's going to be a question as to what the licensee is going to pay for the property. Then the matter turns to what does the property owner contend that the property is worth? If the property owner contended that the site, barring the license, was going to be developed as one of the largest high rise resort condominiums in New Hampshire and he stood to make millions and the licensee said, "Look, you tell me that, but if you put this property on the market tomorrow, that's not what it would bring in

terms of value." You obviously have a conflict, and it would be ludicrous if you fell back on the property owner's definition of a clear break in terms of developing that property.

Senator HUMPHREY. We'd like to submit some questions to you in writing. Thank you very much.

Our next witness is Gordon Marker, president of the National Alliance for Hydroelectric Energy.

STATEMENT OF GORDON A. MARKER, PRESIDENT, NATIONAL ALLIANCE FOR HYDROELECTRIC ENERGY

Mr. MARKER. Good morning. Thank you, Senator.

The National Alliance for Hydroelectric Energy has prepared a statement which we would like to submit for the record, and rather than read it, I will simply speak to some of the highlights of our view on the bill and the bill generally, and we would be glad to entertain any questions.

The National Alliance represents a relatively small group of small scale power developers. We're about 200 in number, but we are active in nearly half of the States of the Union and I think we do fairly represent the nonutility, nonmunicipal sector of developers.

We want to register our support of S. 2500. We think that the legislation is borne out of two problems. One is a commitment to see new energy sources, particularly from nonutilities who are in a particular, or utilities which are in a particular financial bind, to see that energy come on line very shortly without some of the financing constraints that face the utility industry, be they municipal or investor owned.

The second concern that gives rise to your legislation is the fact that before the FERC now there is a flood, if you will, of filings, and many of these are duplicative in one way or another. We feel that the intent of the legislation is to establish a preference which is somehow related to ownership which would both shorten the line at FERC and increase the pace at which kilowatts of capacity come on line.

In contrast to the previous witness, I would like to suggest that the issue is not one of public versus private. I think this bill should not be viewed as an assault in any way, shape or form on the municipal preference. With that in mind, I would suggest that the upper limit on the bill should be explicit to 15 megawatts. We should not be compelled to live with what is the present 5 megawatt ownership parameter as it relates to the exemption process.

I would be prepared to argue that there is a history in documentation within the FERC of competition among municipal entities. This bill would, I think, lessen that and streamline the filing and review process for municipals that had a bona fide, or State agencies, for that matter, that had a bona fide ownership interest in a project.

I have three criticisms or additions that I would suggest. One I've already made, and that is the cap should be made explicit at 15 megawatts for this ownership exemption.

A second one, and it's a rather minor one but it is important when you're looking at development west of the Mississippi, I think, and to some degree in New England, there are situations where a site owner may not have all of the land necessary. Some of that land may be Federal, some of it may be State. In the event that the State agency or the Federal agency that controls the land, if either of those have no mandate to develop that site, then we would suggest that the issue of State and Federal ownership be lumped and not be regarded as a significant determinant in the question of significant ownership of the resource.

A third comment and one which I think is serious, is on the question of evaluation of land that might be taken. Presumably if there is an ownership interest the evaluation of the land that might be taken in a FERC licensee of the sort that we're talking about here would be a relatively small amount of land. I think the value of this land should not be based in any way, shape or form on futures. It should be based on present use or a comparable market value. I do not think in most project areas following on a point that was made by Mr. Hobart, that you will find many examples of a piece of land being targeted for development of a much higher use such as a condominium in a typical project area of a FERC license. If that were the case, I would suggest that you have a much more serious problem, namely building a condominium in a flood plain.

I think to hinge evaluation on the future development of an area really is to provide a windfall to the owner who has no role in the increase of the value at that particular site. I would also suggest that to have this element of future value in a project would open to the opponents of hydroelectric projects a particularly powerful lever; namely, the acquisition of key small parcels of land, then the subsequent valuation of this at a rate such that the project could not or would have great difficulty moving forth.

We think generally that this legislation should be supported; the ownership issue is an important one. We would presume that it applies to existing dams, but also to the land and water resources related to new diversion structures where there are no existing dams, and that will be the characteristic development in the mountain states and in the far west.

Thank you.

[The prepared statement of Mr. Marker follows:]

PREPARED STATEMENT OF GORDON A. MARKER, PRESIDENT, NATIONAL ALLIANCE FOR HYDROELECTRIC ENERGY

I am the President of the National Alliance of Hydroelectric Energy. The Alliance is the trade association which represents nearly 200 participants in small scale hydro development. For the most part, we represent non-utility, private non-municipal developers of hydroelectric facilities. Our membership is drawn from 23 states and is particularly active in the Far West, New England, and Mid-Atlantic states. The Alliance represents a wide range of participants in the industry -- financial, site owners, developers, architectual and engineering firms, and civil contractors. Alliance membership is currently working on approximately 1,500 megawatts of capacity that are in various stages of FERC approval or construction.

We feel that we can speak generally in support of S-2500. The other comments that we make should not be viewed as criticisms of the philosophy of the proposed legislation, but rather as suggested improvements. These additional considerations will, we think, better reflect the needs of both municipal and private development interests in their desire to bring more kilowatts on-line quickly and to reduce the regulatory delay frequently encountered in the FERC and state regulatory processes.

As a general overview, I feel that the proposed legislation is a step forward in the right direction. It has as a basic premise the need to establish the primacy of ownership in project evaluation. We see that this addresses a major problem in the present FERC process. As you are well aware, since the passage of the Public Utility Regulatory Policy Act in 1978, there has

98-140 O—82——5

been a rather remarkable acceleration in interest in hydro site development. This has taken place in an environment which has been more than a little hostile. It has been characterized by high interest rates and a short term oil "glut" which is manifest in a decline in avoided costs facing many utility customers.

Nevertheless, applicants before the FERC have greatly accelerated over this period. A quick review of the nearly 2,000 filings before the FERC will, however, reveal that a significant proportion of the total involve more than one applicant filing on a particular site. In some cases this is a municipal entity filing on a privately owned site. In other situations, it is a private developer or a municipal developer filing on resources owned by, for example, a lumber or paper company. And in yet other instances, there are municipals filing on sites that are owned by other public entities such as state agencies. All of this has lead to a great deal of confusion within the FERC and it is, I feel, the thrust of S-2500 to deal with this problem. We applaud Senator Humphrey for his initiative in this legislation.

We would, however, like to take this opportunity to suggest a number of improvements which might be worked into the legislation. This should not be taken as detracting in any way from the overall philosophy embodied in S-2500.

On the question of ownership exemption, I should like to point out that present legislation does not really change the status quo. As we read it, the ownership exemption would stay at the 5 megawatt level. There are a number of site, I would like to point out, where the site ownership preference very

substantially exceeds the 5 megawatt ceiling. We would suggest that the maximum be raised to 15 megawatts.

Unfortunately a commonplace in the discussion on the ownership exemption has been the degeneration of the debate into a public versus private power confrontation. We feel that this is not the case; in fact, rather it is a smokescreen to divert interest from the real issues -- i.e., getting increments of hydroelectric capacity into the national energy system in as short a time as possible. I would submit that the site owners to be benefited by this proposed legislation are both private developer interest and municipals. It may well be that, in terms of megawatts, the municipal groups have more to gain in the process than do the private developers. In any event, the proposed legislation does protect the site owner from unwarranted incursions from erstwhile non-owner developers. This is a case whether they are "foreign" municipal or private entities.

Ownership of the site and the necessary water rights (or access to them through cooperative agreements with state agencies) to undertake the project should be given appropriate recognition in the FERC process. We feel that there should be additional recognition of public lands in this formulation. That is to say, where a site owner has most of the land required for a project, it should not be constrained from exercising site-owner preference where the other additional land is held by a public entity. The exception to this might be where the public entity itself is the applicant for control of the entire site. In this case the municipal preference would dominate the situation.

The major problem that the National Alliance has with the proposed legislation is on the valuation of land to be taken for a particular project. We presume that this is land which is in addition to the basic preference established through ownership of most of the project lands in the first place. We feel that the valuation of this land is of such critical importance that it could mean the difference between going ahead or stopping a project. It adds nothing to project development to speak to future values or highest and best use in the light of the particular parcels required to implement the full hydro potential of a site. Land should be valued at its current use, not at its future use.

The one way to stifle a project, whether it be municipally or privately owned, is to attach additional uncertainty to the project development process. In the context of this legislation, it would be possible for a particular adversary of the project to obtain a piece of land solely for the purpose of attaching a high value related to <u>future</u> use in the event of an eminent domain taking. The consequence would be to delay or prevent a project being implemented under the proposed legislation of S-2500 rules of the game.

We feel that this is not the intent of the proposed legislation. The suggested valuation process in S-2500 misses this point. The present land-taking processes open to a federally licensed project are adequate. And in most states, for unlicensed facilities, the state eminent domain proceedings are also adequate in most cases. We would argue in this situation

for a continuation of the status quo.

Finally, we feel that the effective date of the proposed legislation should not be when the permit, license or exemption has been issued. This losses sight of the fact that a very substantial commitment of resources has been made by either a municipal or private developer to a particular project before that date. In most cases this will range between $500,000 and $1,000,000. Rather, we would suggest that the effective date of legislation be related to the date at which the exemption, license, or preliminary permit was filed, not issued. To protect present projects, the effective date should not be prior to the Senate hearings or the bill's passage.

We hope that these additional comments are of value in the evaluation of the proposed legislation. If they are accepted in major form, the National Alliance and its various consituents will be pleased to support vigorously the passage of S-2500.

Thank you.

Senator HUMPHREY. Thank you, Mr. Marker.

In regards to the new diversion site, could you tell us more about that, and other activities in that part?

Mr. MARKER. The hydroelectric development potential which I think is greatest for non-Corps of Engineers, essentially small scale approaches, are going to be projects which utilize hundreds of feet of drop. At the upper end there is a small diversion structure which is not regarded by the FERC as a new dam. It is utilizing a "natural water feature" and is utilizing the gradient of the mountain side.

The western projects which is typical in Oregon, northern California, Washington, Montana, and Idaho, these are essentially pipeline projects and they are eligible for the bulk of the tax benefits that are presently in small scale, or the initiative for small scale power production. There are many competing applications in these sorts of projects. In some of the projects there is private land involved. There is also Forest Service, U.S. Department of Agriculture land, et cetera. Where there is no mandate to develop these publicly, it would seem to me that the interest of expeditious hydropower development can best be served by specifying that if a municipality or if a private entity owns land in the subject area, that they should be given a preferential role as opposed to anybody who might file on the site.

Now of course there are other issues here. The size of the project, the best utilization of the resource, et cetera.

Senator HUMPHREY. I'm going to have to recess for about 10 minutes. We have a vote underway.

[Whereupon, a brief recess was taken.]

Senator HUMPHREY. I want to thank Mr. Marker for his testimony. We have a number of technical questions we'd like to submit to you in writing. Thank you very much.

The next witness is Peter Brown and William Wilson from Franklin Pierce Energy Law Institute.

Good morning and thank you for your patience. We're glad to have you here.

STATEMENT OF PETER W. BROWN, DIRECTOR, FRANKLIN PIERCE ENERGY LAW INSTITUTE, CONCORD, N.H., ACCOMPANIED BY WILLIAM H. WILSON, SENIOR RESEARCH FELLOW, FRANKLIN PIERCE ENERGY LAW INSTITUTE

Mr. BROWN. Thank you for letting us be here. I'm Peter Brown and on my right is Bill Wilson. We're members of the staff of the Energy Law Institute in Concord, N.H.

We'd like to have the prepared statement of Mr. Wilson and myself included in the record. I would point out some of the main issues raised by S. 2500.

I will speak to the question of the preference provisions in section 4 of the act and talk a little bit about the municipal preference and Mr. Wilson will talk about the ability of the Federal Energy Regulatory Commission to apply the standard of substantially superior, he'll talk about the eminent domain provisions of the act.

The situation that this bill attempts to address and we think it addresses it quite effectively and we favor passage of the legislation, is one in which people find themselves involved in a "Catch-22" situation. And in light of Mr. Hobart's comments here this morning and in our work in trying to assist the State and municipal agencies in developing resources that they own and have owned for some period of time, we come up with a curious problem and the problem is this: On the one hand we have received telephone calls and inquiries from towns and municipalities where they have been approached by a private developer to have the town assist the developer in filing a permit or a license on a site that the town doesn't even own, that's not even located within the town property, and there will be a payment to the town for that service.

Most towns that we've talked to have had serious concerns about that kind of approach and have backed off from the arrangement after we've talked about it.

Senator HUMPHREY. Is that widespread?

Mr. BROWN. I don't know how widespread it is but we've received at least three or four inquiries along that line and my understanding is that there are filings at FERC which manifest that kind of situation. And the Federal Energy Regulatory Commission has quite appropriately taken steps to deal with that under its hybrid rules and regulations.

The other side of the coin is the situation where you have a town which was given the dam by the utility some years ago for $1 because at that time the hydroelectric facility at the dam no longer proved economically feasible. The town has borne the responsibility for maintaining the dam and making sure the dam is safe, and trying to assure that property and people are not injured by the location of the dam. And the town, at the same time the town couldn't afford to breach the dam to any of the structures. Now the town is confronted with the fact that it has a resource in its own backyard which is a valuable resource and could be used to support some of the town's activities, whether it be general revenues to support the town's functions or some other purposes such as maintaining parks and the like.

The town would like to go forward with developing the resource but the town has a town manager and his concern or her concern is usually a whole variety of things and they're not expert in hydroelectric development. So what happens is that they have to develop a process of how to manage this resource and that takes time. You have to talk with the selectmen of the town or whoever the town authorities are and work out a program. Once the program is worked out, usually the town, especially in the northeast, says well the private sector can do this better than we can and we would like to invite the private sector in and we would like to literally hold an auction of the resource so that they can use the resource to develop and pay some rent. That takes time.

While this is going on people will come around and they'll file a preliminary permit on it. And in the mean time the town is talking to its lawyers, it's talking to its town manager and all of these things are going on and they cannot respond to the situation they are confronted with to file a competing preliminary permit application or exemption application because they're just not ready to.

Now this all occurs because of the existence in the Federal Power Act of the authority of the Federal Energy Regulatory Commission to decide who gets the site. Disregarding whatever property interests are associated with the site, and I beg to differ with Mr. Hobart with respect to his characterization of property rights and water. States do recognize property rights of water. They are not part of public domain, either under the appropriation system in the West or the system in the East. Water rights owned by private individuals are designated property rights.

But at any rate the Federal Power Act, to the extent that it gives FERC the power to allocate this site to someone else, disregards the State and property law. What this bill it seems to me does is to say essentially this: We are going to base the determination on who gets the site in part, in substantial part, on who owns the property. It's a historic principle based in our constitution, based on longstanding property rights that have been established over a long period of time under State law and it's a neutral principle. Not who gets there first, not who sort of wins the race to the FERC doorstep, but on the basis of who owns the site.

Now the law as proposed would seem to me to take care of the two situations that I've described. With respect to the speculator who goes out and convinces the town to file on the site when the town has no interest, there is no preference, and the owner of that site who is confronted by that kind of speculative activity has protection given by the statute. It also has the FERC protection under the hybrid rules, but again requirements are a problem.

The situation where the town owns the resource and also takes the time for developing that resource, there they're protected because they're given what I would call the super preference established by section 4 of the act.

In addition, individual private property owners are also protected and I think that's important. And in that connection the only thing I can say is that if a private property owner doesn't want to develop a site, existing regulations and existing statutory provisions in the Federal Power Act to assure that hydroelectric power on that site occurs if it's appropriate.

One final point I'd like to make is that despite what Mr. Hobart has said, I think the act, the proposed act, does strengthen municipal preference. The one situation where the municipal preference is not strengthened is where the municipality wants to go in and take over the site of someone else. And I submit even there the municipality has the authority under State law, State eminent domain law, if it wants to do that. And it has the authority given to it by its State constitution or State legislation. It can go in and condemn, take the property from the private owner outside and apart from the Federal Power Act, just under State eminent domain law. Acquire the property interest and go in for an exemption application or whatever it happens to be.

But other than, well aside and apart from that there is an additional strength in the preference. No. 1, if a private developer's project is slightly better than the municipality's proposed project, as I read the rules today, the private developer gets, under the proposed legislation, the municipality would get. With respect to another possible attractive area of development especially for munici-

palities and irrigation districts in the West where there are federally-owned sites, where the preferences under sections A and B of section 7 of the act do not apply, the municipalities would be given a substantially superior preference than what they had to date at those sites.

So under those circumstances it seems to me that the municipal preference is strenghtened and not weakened.

On that note I'd like to refer the remaining comments to Bill Wilson.

STATEMENT OF WILLIAM H. WILSON, SENIOR RESEARCH FELLOW, FRANKLIN PIERCE ENERGY LAW INSTITUTE

Mr. WILSON. Good morning, Senator.

I'd also like to thank you for the opportunity to present comments to the committee on this legislation.

As Mr. Brown indicated I'd like to make a few comments in regard to three areas of the proposed legislation. The first has to do with the suggested standard of substantially superior as the standard to be applied in determining when a nonpreference applicant will succeed against a preference applicant.

There has been some indication, or actually some testimony this morning to the effect that No. 1, that standard may be difficult to apply and consequently confuse rather than advance the process of licensing, and that No. 2 there is something inherently unfair about the application of that standard.

I'd like to say that the apparent intention, and I think it happens to be a good one of the change as Mr. Brown sort of suggested, is to give a clear signal to nonpreference applicants for license permits, that the burden required to overcome the preference awarded by the other pieces of legislation here is substantial, is greater than that that has been the case under current law.

Consequently I think that should, if anything, expedite the process since it would give the FERC the potential for more latitude in avoiding getting bogged down into difficult comparisons between close plans competing.

However, by the same token, I do not think that the creation or the implementation of that standard would place a substantial burden on FERC personnel or would require very much time to become fully active in the process. I think that's something they could apply with relative dispatch.

The whole point of a revised standard is to place in conjunction with the other pieces of the legislation, is to place even greater emphasis on up front negotiations and necessary property interests rather than having that process be determined after the fact or as a facet of licensing.

The next section I'd like to address is the proposed change in the eminent domain standard in those cases where federal eminent domain under the Federal Power Act is to be used to assist a license applicant in acquiring other rights to develop his project. I have to say that is the section that has given some of us the most difficulty in attempting to come up with a method to resolve what is essentially a perplexing philosophical issue.

That is to say, on the one hand there is obviously some great value incurred here in expeditious development of the hydroelectric resource around the country. On the other hand there is obviously an equal compulsion to protect the vested interest of property owners in what is in their hands potentially a valuable commodity. That is to say a dam site itself.

I would have to say that the compromise that S. 2500 appears to strengthen in that regard is well motivated and perhaps a necessary change in the existing legislation, that is existing in the existing law as to how property owners currently get compensated for the loss of a hydroelectric resource. However, I would also say that viewed in the context and in conjunction with the other proposed changes to the Federal Power Act in Senate bill 2500, it is not as important as would be the case were those changes not to take effect. And as to whether or not there is some better language that would enable a fair appropriation between the two interests that I mentioned that are trying to be served earlier, I would have to say that may bear some further examination and perhaps something that should be considered in an additional draft.

Now the last issue I'd like to address is the final phase-in provisions proposed in S. 2500. I would say they seem to recognize what is a fair compromise between the need to assist that part of the resource which is, or has the potential of being held up because of competing applications and the need to recognize the investments that current applicants have made in the projects that are currently in the application process.

I believe Ms. Nygaard points out very effectively in her written statement that nothing in the proposed legislation would change the current FERC rules with regard to the timing, the filing and timing requirements for licensing exemptions of permits. That is, the impact of the legislation would fall only on future applications and on current applications where there is already competition and competition involving site owners. And I think in those cases it's fair to say that nonsite owner applicants who are involved in those competitions can hardly be said to be surprised by the possibility that they may have encountered some difficulty going foward with their projects.

That concludes my remarks.

[The prepared statements of Mr. Brown and Mr. Wilson follow:]

PREPARED STATEMENT

CONCERNING S. 2500

The Energy Law Institute (ELI) of the Franklin Pierce Law Center has been engaged in a number of studies of the problems confronting hydroelectric development in the United States over the past four years. Peter W. Brown, Director of ELI and Professor of Law at the Law Center, has been principal investigator for several studies sponsored by the Department of Energy, the Corps of Engineers and the Governor's Council on Energy of the State of New Hampshire on hydroelectric development. William H. Wilson, is an attorney and Senior Research Fellow at ELI. He has been actively engaged in case studies of various hydroelectric projects throughout the United States, is currently engaged in a program to provide assistance to some twenty state legislatures on the development of hydroelectric power in these states, has studied and written on the financial and tax problems confronting hydroelectric development and has assisted the Water Resources Board and the Governor's Council on Energy of the State of New Hampshire with respect to the development of hydroelectric power at state owned dams.

PREPARED STATEMENT

CONCERNING S. 2500

I. INTRODUCTION

The authors of this statement favor the proposed legislation with certain minor, technical changes. It is the view of the authors that the proposed legislation will have the desirable effects of reducing uncertainty about the licensing process, reducing licensing conflicts and attendant delays, reducing administrative workloads of the Federal Energy Regulatory Commission (FERC) and protecting established property rights of both private and public parties without eliminating the present incentives of the Federal Power Act to hydropower development.

II. COMMENTS ON SALIENT PROVISIONS OF S. 2500

A. The Exemption Preference Provisions - Sections 2 and 4

Section 2 of S. 2500 adds a new definition to Section 3 of the Federal Power Act. The proposed new definition assumes that the Federal Power Act provides mechanisms to exempt "projects" from the FERC licensing process. In fact, Section 213 of the Public Utility Regulatory Policies Act of 1978 (PURPA) provides for a "conduit hydro" exemption and Section 408 of the Energy Security Act of 1980 provides for exemptions for projects of 5 MWs or less using existing dams or the natural water features of sites. Most importantly, the new definition of a "Qualified Exemption Applicant" is limited to persons, including states and municipalities, which have the property interests necessary to proceed with development.

This limitation is designed to be read in conjunction with the new Section 4 of S. 2500 which confers a clear preference to those persons, states and municipalities which meet the requirements of Section 2 of S. 2500. By way of illustration, the present conduit hydropower exemption regulations of FERC (18 C.F.R. § 490 et seq.) permit one who does not own property rights in a conduit hydropower site to obtain an exemption. Furthermore, the exemption regulations for projects of 5 MWs or less permit an exemption to a project which uses or occupies federal lands and requires no additional property rights to qualify for an exemption. [18 C.F.R. 4.103(b)(2)]. Under Section 2 of S. 2500 as drafted persons owning no property rights in a conduit site or a 5 MW site using solely federal property would not be "qualified exemption applicants" and would not be entitled to the benefits under Section 4 of S. 2500.

Section 4(a) grants a preference to "qualified exemption applicants and significantly strengthens the existing "municipal preference." Under the terms of Section 4, FERC is to prefer the qualified exemption applicant over the preliminary permit applicant or license applicant unless the permit or license applicant proposes a project which is substantially superior to the project proposed by the qualified exemption applicant. This statement will discuss the proposed standard of "substantially superior" more fully below.

Section 4(b) provides a clear preference to permit or license applicants who own the necessary property rights in a site exclusive of federal lands and transmission rights of way. This provision seeks to protect site owners which, for any number of reasons, may choose to seek a permit or license in lieu of an

exemption. They are to be granted the permit or license unless a competing applicant purposes a "substantially superior project."

Section 4(c) strengthens the "municipal preference" by clearly favoring state and municipal applicants for permits and licenses unless a competing applicant proposes a project which is substantially superior to the municipality. This changes present law in that, currently, if the private, non-municipal applicant's project is only slightly better than the project proposed by the municipal applicant, the private applicant will receive the permit or the license.

Sections 4(a), (b) and (c) would appear to have the salutary effect of deterring unseemly and costly activities currently occurring in hydroelectric development in the United States. These activities have been characterized as "claim jumping" and the "race to the FERC doorstep." Claim jumping is deterred because potential developers whose pecuniary interest in a particular site is no greater than the gleam in their entrepreneurial eye will think twice before slapping a preliminary permit application on a site owned by a municipality, state agency or private person. Races to the FERC doorstep will be substantially reduced because even if a developer files first, FERC will be required to evaluate a "second or third in time" application by a site owner to determine if the first in time filing is "substantially superior" to the application of the site owner.

Moreover, the present incentives in FPA and FERC regulations to encourage development will remain. First, the new law will encourage voluntary arrangements between site owners and developers. Second, if the recipient of an exemption, permit or

license dawdles in developing the site the standard conditions of an exemption, permit or license which require commencement of construction or the filing of a license within a prescribed period will presumably continue to apply.

B. The Municipal Preference and Proposed Sections 2 and 4

Careful examination of the proposed legislation will demonstrate that in major respects the municipal preference is strengthened by Sections 2 and 4. As noted above, currently a municipal applicant can lose a contested licensing proceeding if the competing developer's project is only slightly better than the project proposed by the municipality. Under the proposed legislation, the competing developer's project must be "substantially superior."

Secondly, municipalities who own their sites will be substantially better protected than under current law. The authors' own experience in providing assistance to a number of state and municipal agencies who own potential hydroelectric sites has established that it is very difficult for municipal and state agencies to plan carefully and proceed with the development of their own resources when these very same resources can be snatched away by a developer who files a preliminary permit or license application on a site before municipal or state plans are fully developed. Under the present law, these municipalities either obtain the strengthened preference of the "qualified exemption applicant" or the owner-permit or license applicant.

Thirdly, the municipal preference is strengthened in another category of competing applications. If neither the municipal applicant nor the private developer own the site, the municipality will receive the permit or license unless the competing developer

proposes a substantially superior project. This strenghtened municipal preference has particular relevance to non-federal development of federally owned sites. In this situation, municipalities, including irrigation districts, will be given the strengthened preference over all other developers except the federal government. The federally owned potential hydroelectric capacity is substantial, diverse and should be developed. State and municipal development of this resources will contribute to our energy independence at virtually no cost to the federal government and, in fact, will generate revenues for the federal government in the form of user fees.

C. The Standard for Overriding Preferences - Sections 4(a), (b) and (c)

S. 2500 provides that the new preference for qualified exemption applicants and site owners in the FERC licensing process can only be overridden when a competing application proposes a substantially superior plan for development. As noted earlier, this standard places a greater burden on nonpreference applicants than the current Federal Power Act § 800(a) requirement for some showing of a better than "equally well adapted" plan. The stronger standard should give a clear signal to potential nonpreference applicants that their prospects for prevailing against the serious application of a preference applicant are small. However, this standard should still provide the FERC with sufficient flexibility to favor a nonpreference applicant where the plans of a preference applicant are clearly inferior. The effect of imposing a greater burden on competing nonpreference applicants should be to further encourage voluntary up front negotiations between site owners and developers and eventually to

reduce the number of competing applications for a given site.

D. The Standard for Compensation in Eminent Domain Actions Under the FPA - Section 5

Section 5 of S. 2500 explicitly applies the traditional measure of damages in eminent domain proceedings to any condemnation under authority of the Federal Power Act. While it may be argued that under current law, any party invoking the eminent domain power of the Federal Power Act would be subject to this standard, there have been a number of cases involving federal development where the site owners were not compensated for the expected value of their property as a hydropower facility. Explicitly stating the standard for compensation as "highest and best use" for the property should clearly indicate that the value of a property for hydropower purposes should be awarded a dam site owner, if in fact that purpose is the highest valued use of the property.

It should be noted that holdout owners of fractional property interests necessary for the development of a given project should not be able to "bankrupt a project" under this provision because in most cases they could not show that they were able to make use of their fractional interests for water power production. For example, riparian property owners downstream from a proposed hydropower project would usually not be able to get water power production value for water diverted by a license holder from the stream flowing by their property because mere title to such flow, without more, would not enable the riparian owner to develop a hydropower project. Conversely, a part owner of a dam could make such a showing. That is eminent domain compensation to a property owner is generally based on the value

98-140 O—82——6

of the interest taken in the hands of the original owner, not on the value of the interest to the party condemning the interest.

Overall, this section should encourage non-site owner-developers to negotiate in good faith to acquire necessary property rights for the development of a hydropower project as well as establishing a fair measure of compensation for any takings required. The provision also offers some protection for site owners who lost out to an earlier filed license or permit application under current law.

E. Phase in Provisions - Section 6

Section 6 of S. 2500 extends the effect of the new law to all permit, exemption and license applications pending as of the effective date of the act. The amendments would not apply to permits, exemptions or licenses granted prior to this date. On its face, this provision may appear to unfairly disregard the investments made to date by some current applicants. However, it should be noted that nothing in the proposed amendments would contravene the current FERC regulations governing the time limits for the filing of competing applications. Hence, the only classes of previously filed applicants affected by the amendments would be those currently facing competing applications or those with applications where the time for filing competing applications had not expired as of the effective date of the Act. In either case, it cannot be said that a non-site owner applicant had no reason to expect that his investment in his application was without risk of loss or substantial delay as a result of his failure to tie up the majority of his necessary property interests in advance. In addition, FERC data indicates that the vast majority of potential

hydropower permit, license or exemption applications have already been filed. Thus if the proposed legislation is to have a meaningful impact on reducing the delays confronting a significant portion of the hydropower sources (i.e., sites currently subject to competition), then such a provision would seem essential.

III. CONCLUSION

In the last analysis, however, S. 2500 calls for a reexamination of some of the historical premises of the old Federal Water Power Act of 1920. At the time of the original legislation there was a great fear that promising hydroelectric sites, considered the most significant source of electric power generation, were being monopolized by a small group of electric utilities. See Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1946). The current experience of FERC with filings for permit, license and exemption applications is strong evidence that the historical premise of the FPA is no longer apropos. Of the some 1,800 filings, by far the large percentage are by private developers and public agencies and not by the investor owned utility industry. Under these circumstances, the changes proposed by S. 2500 address current problems with appropriate and relevant remedies. The authors strongly urge the prompt passage of this bill.

Senator HUMPHREY. Thank you.

Mr. Brown, you addressed a number of the objections raised by the public power people. Their second point is that the objection that S. 2500 would be a step away from the wide water utilization policies of existing law. Is it your opinion that private owners have any advantage in water utilization over the others?

Mr. BROWN. I don't think that either private developers or public developers can claim that one is wiser than the other in this area. If we look at some public developments around the country we see the Teton Dam, that was a public development. We have in our own State facilities developed by private entities back in the 1920's that are still running today, running well and with minimal effect on the environment. So I don't think either one has the monopoly on wisdom here.

And to the extent that the municipal preference has been incorporated in the legislation, it goes back to 1920. There is one historical antecedent that I think is important to mention here which I think the APPA people failed to do, and that is at the time the legislation was passed in 1920, looking at the legislative history of it, there was a grave concern and grave fear going all the way back to Theodore Roosevelt's earlier pronouncements on the subject and trying to get comprehensive water legislation passed, that hydroelectric sites would be monopolized by a small clique of utilities, and at that time we have to understand hydroelectric power sources were considered to be the most significant source of electrical generation.

Just taking a look at Ms. Nygaard's tables at the back of her testimony, if you look at the filings, it's clear on the basis of recent experience that this clique of utilities, wherever they were, and whoever they were at the time that legislation was passed in 1920, is pretty much the minority in terms of the proposals for development.

If you look at table C of Ms. Nygaard's testimony, you will see the breakdown. If you look at public power agencies they have some 700 or close to 800 filings in terms of permit applications of 1800's. Private owners have another 876 and investor owned utility industry is lagging far behind with 96. I don't see the sites being monopolized in the same sense that they were thought to be monopolized back in 1920.

So my feeling is that historical antecedent for the law no longer exists.

Senator HUMPHREY. Excuse me.

[Discussion held off the record.]

Senator HUMPHREY. Back on the record.

Did you have more to say on that point?

Mr. BROWN. No, I did not.

Senator HUMPHREY. Again referring to the objections of the power association under the third objection you state that any of the development rights to a public agency insures the public purpose it would serve. Is not the public purpose served in the same way if that happens to be granted to a private party? Do you see any distinction in favor of the public?

Mr. BROWN. No I don't. I mean the claim there is obviously because a public entity which may have an elected board or an ap-

pointed board by a municipality develops a project that the public will be served in the sense that the public agency will be provided electric service but given the nature of electric utility franchises in the United States, whether they're private or public, the public has to be served under either circumstance.

Senator HUMPHREY. Section "D" of the APPA testimony identifies a community of citizens who will be assisted. Is that argument, does that argument carry any weight in your opinion?

Mr. BROWN. I guess it goes back to the question of who do the public agencies represent. If it represents a municipality then the community that, or the community of citizens in that municipality will somehow benefit by the development of the hydroelectric resource by the public agency and I suppose that's correct. Again, but to the extent that a private owner develops a project or an investor or an electric utility develops a project, the electricity is going to end up in the same place with the citizens of that particular community who use it.

Senator HUMPHREY. In that sense we ought to be looking for ways to use it as much as we can. Not who produces it but——

Mr. BROWN. Yes, and one of my points was these same communities of interested citizens own resources now and they aren't able to use those resources for those community resources because of the system that we have in place at the moment, and I think that the proposed bill will change that.

Senator HUMPHREY. The third part of that argument is that granting development rights to a public agency runs to a nonprofit distribution for benefits. In your experience has there been a superior provision of services on a nonprofit basis versus a for-profit basis?

Mr. BROWN. You can't say one way or the other. When I think of nonprofit distribution I begin to think of subsidies. Subsidies to electric service. It can be a tax subsidy in the form of tax exempt municipal bonds that are sold by the public agency to develop the resource or it can be in terms of taking tax revenue from the general revenue pile and putting it into your municipal electric light agency to reduce rates. Either way it seems to me that it raises the danger of misallocation of resources by sending out the wrong signal.

Senator HUMPHREY. In cases where subsidization or hidden costs occur.

Mr. BROWN. That's right.

Senator HUMPHREY. Again the public power advocates oppose, well I just want to make it clear that if S. 2500 passes in its present form there's going to be no dimonition of the public interest in the sense that if a site owner chooses not to develop it it can still be taken by public domain.

Mr. BROWN. That's correct.

Senator HUMPHREY. Likewise if he obtains a license and afterward changes his mind if he doesn't develop it in the four years another party can apply for a license.

Mr. BROWN. That's correct.

Senator HUMPHREY. There's no deminution.

Mr. BROWN. No. The condition of the license or the exemption that required the development within certain periods of time. As I see the bill it would continue.

Senator HUMPHREY. We may have a number of further questions to submit to you.

Mr. BROWN. I have one other point. I'm mindful of the public power movement in the United States. The provisions in the bill that I like, which based on this neutral principle of respecting property owners also go for expanded municipal preference. There is an important aspect of municipal development of hydroelectric resources and public power, and that aspect is it is another competitive element in the electric utility industry. An industry I think that needs competition. And for that reason I think it's important to have a municipal or public power present in hydroelectric development.

And for the life of me, Senator, I don't see this bill taking that process away.

Thank you.

Senator HUMPHREY. Thank you very much.

We've certainly had some conflicting testimony here. I'm sure it's all given in good faith. We're not questioning anyone's argument or the basis of their arguments.

We'll be working with the various parties trying to perfect this bill and I hope that ultimately we can have full support for it from most of the parties if not all.

Thank you very much.

[Whereupon, at 12 noon, the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

7/21/82

STATEMENT OF BN TIMBERLANDS INC. IN REGARD TO S. 2500, "THE FEDERAL POWER ACT AMENDMENTS OF 1982," SUBMITTED JULY 22, 1982, TO THE SUBCOMMITTEE ON ENERGY REGULATION OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

BN Timberlands Inc. (BNTI), a subsidiary of Burlington Northern Inc., manages approximately 1.5 million acres of forest land owned by the Burlington Northern Railroad Company in the States of Washington, Oregon, Idaho, and Montana. The land is located generally in more mountainous areas of those States and, as a result, contains several potential small-scale hydroelectric sites.

Under present law, any individual or business can file for a preliminary permit to study a possible hydroelectric site on almost any tract of land, whether or not that individual or business has any interest or ownership in the land. Even if the owner of the land elects to file a competing application for the preliminary permit, the chances are that the non-owner, as the first filer, will receive the preliminary permit.

The landowners' options are limited when a filing is made on his property, if indeed he is aware of the filing. The landowner can file with the Federal Energy Regulatory Commission (FERC) a Comment, Protest, Petition to Intervene, Notice of Intent to File a Competing Application, or a Competing Application - the same options any other person has. The landowner gets no preference, is left without any decision in the matter, and feels very frustrated. He has essentially lost control of that portion of the land involved in the potential hydro project; and no one, in most cases, has even asked his opinion. In fact, under present law, it would be possible that a license to develop a hydro site could be granted without the landowner knowing anything about it. In 14 months, there have been 23 applications for preliminary permits involving land managed by BN Timberlands. In only four cases did the applicants contact BNTI before filing the application.

Landownership is one of the rights held in highest esteem in this nation. As a landowner and manager, BNTI believes that some of those rights are lost under the present Federal Power Act and strongly urges enactment of the amendments contained in S. 2500.

In addition to giving preference in the matter of preliminary permits, exemptions, and licensing to those with property rights, S. 2500 reduces the current municipal preference. This preference was useful when large power plants were in vogue,

when a dam and its impoundment might require several square miles of area. Now it is used and has been used many times to override earlier preliminary permit applications, in some cases even those made by the owner of land in the project. In some instances, the municipal entity has used the identical application, substituting only its own name. It has been done by small towns, most of which have never been in the power business, with the encouragement and help of a non-landowning developer and/or engineering firm, with minimal charge, if any, to the town. A municipal entity should have to operate under the same guidelines, rules, and regulations as everyone else. Section 4.(b) of S. 2500 will certainly help reduce the incidence of "claim jumping" and has BNTI's strong support. Not all municipal entity applications are of this type, but there are enough to cause great concern to landowners. If municipal groups are serious, State eminent domain laws are still available.

Section 5. of S. 2500 proposes to alter the measure of damages in eminent domain proceedings under the Federal Power Act from "current use" to "highest and best use." This is long overdue and its early implementation is encouraged.

The term "substantially superior" is used several times in the Bill relative to competing applications. A "substantially superior" determination should not be based solely on potential power output. A 10-megawatt proposal could be said to be "substantially superior" to a 5-megawatt proposal at the same location on the same stream, but environmentally it may be far more damaging and thus not truly "substantially superior."

Under S. 2500, if a preliminary permit application is to succeed, the applicant will want to secure the necessary property rights. This will have the added advantage of showing the correct land ownership on the permit application. In the present circumstances, preliminary permit applications can be woefully inadequate as far as giving correct ownership data for land within the proposed project boundary. Applications have been filed for projects involving BNTI-managed land in which the applicant noted the land was administered by the U. S. Forest Service. Such inaccuracies are unfair to both the actual owner and to FERC.

BNTI fully supports S. 2500 as it is written and urges early Committee action and passage. It should take effect at the earliest possible time after signature by the President.

COWLITZ COUNTY PUD • ELECTRIC AND WATER SERVICE
960 COMMERCE AVENUE • LONGVIEW, WASHINGTON 98632 • TELEPHONE 206 423-2210

Board of Commissioners:
JOE B. HILL JOHN M. SEARING HOWARD B. RICHMAN

General Manager:
ROBERT L. McKINNEY

August 27, 1982

Honorable Gordon J. Humphrey
United States Senate
6205 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Humphrey:

S. 2500

The purpose of this letter is to present my written views for inclusion in the hearing record concerning S. 2500. As President-Elect of the American Public Power Association I join in the written views of that organization previously supplied to your Subcommittee on Energy Regulation and with the oral testimony of Larry Hobart, Deputy Director of APPA, presented at the hearing held by your Subcommittee on July 22, 1982.

I wish herein to specifically address and confirm my understanding that the provisions of S. 2500 were in no way intended to modify the existing law of preference on relicensing granted to public agencies by Section 7(a) of the Federal Power Act, 16 U.S.C. 800(a). On several occasions members of APPA or its staff confirmed this understanding with your Subcommittee Staff. As a result of their understanding that the apparent elimination by the bill of the relicensing preference for public entities was a result of inadvertent draftsmanship, the issue was only summarily addressed at page 10 of APPA's written testimony. In addition, a Subcommittee Aide confirmed during a recess in the hearing on July 22, 1982 that the Senator's written introductory remarks would confirm that the bill was not intended to modify the existing preference for municipalities on relicensing.

In addition, I would like to take this opportunity to urge for the record my view as General Manager of the Cowlitz Public Utility District that there is a substantive reason that the existing law of municipal preference on relicensing not be taken up by the Senate at this time.

The relicensing preference granted to states and municipalities by the Federal Water Power Act of 1920, after careful and considered thought and with the recognition that the energy produced by waters belonging to the people of the Nation should be made available to them on a not-for-profit basis, is a subject of current litigation in Federal court.

Acting on requests for declaratory orders by several municipalities, and after extensive legal briefing and a full day of oral argument, the Federal Energy Regulatory Commission in 1980 issued its Opinion No. 88 holding that states and municipalities do indeed have a preference on relicensing over an original non-public licensee if they are able to demonstrate that their plans for ownership and operation of a project are equally well adapted in the public interest as those of the private competing licensee. The Opinion also indicated that all pending competing relicensing proceedings involving public and private applicants should go forward in the light of its Opinion No. 88.

The FERC Opinion No. 88 and its "generic" legal issue of the relicensing preference was appealed to the 11th Circuit Court of Appeals by private utilities. Oral argument was held on February 2, 1982 and a decision is pending.

In addition, there are several actual competing relicensing proceedings pending before FERC. One of these involves a competing relicensing proceeding between the Clark-Cowlitz Joint Operating Agency and the Pacific Power & Light Company. The Clark-Cowlitz Joint Operating Agency was established by the Clark and Cowlitz County Public Utility Districts under the laws of the State of Washington in 1976 to pursue acquisition under the provisions of the Federal Power Act of the FERC license for the Merwin Project held by the Pacific Power & Light Company. An evidentiary hearing will commence on September 20, 1982. All parties have now filed their written direct and rebuttal testimony and are in preparation for hearing.

On the basis of the above-described pending litigation, it is my view that it would be inappropriate at this time to entertain any legislation designed to eliminate the long existing law of municipal preference on relicensing, which is yet to be exercised for the first time. In summary then, I was gratified to learn that your bill, S. 2500, was not intended to modify the existing law of preference on relicensing.

I thank you for the opportunity to submit these views and respectfully request that they be made a part of the hearing record on S. 2500.

Sincerely,

Robert L. McKinney
General Manager

jn
cc: American Public Power Association

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EDISON ELECTRIC INSTITUTE The association of electric companies

1111 19th Street, N.W.
Washington, D.C. 20036
Tel: (202) 828-7400

July 23, 1982

The Honorable Gordon J. Humphrey
Chairman
Subcommittee on Energy Regulation
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In response to the request of Subcommittee staff, we appreciate the opportunity to present the Edison Electric Institute's (EEI) position on S. 2500.

As you may know, EEI is the association of America's investor-owned electric utility companies. The member companies of EEI serve 99 percent of all customers of the investor-owned segment of the industry and 77.5 percent of all users of electricity in the United States.

EEI has consulted many of its members who have an interest in hydroelectric development and found little support for the particular changes in the Federal Power Act that are proposed in S. 2500.

Few companies are involved in FERC applications involving wholly-owned sites. Although the bill's provisions for a site-ownership preference might be helpful in such cases, even those companies which own sites see disadvantages arising from this approach in other contexts, and in fact would prefer that there be no change in the procedures. They also believe that the question of site ownership can be considered by FERC under its present legal authority if it has a relationship to the owner's ability to make better use of the resource.

The filing of a preliminary permit application is merely a means of preserving some right to develop a site if and when the subsequent engineering and other studies prove that such development is desirable and economically feasible. Generally speaking, companies which do not

own sites would not find it desirable to expend scarce capital to buy a hydroelectric project site in advance of such studies, not knowing whether the site can be used. Moreover, to qualify for the site owner preference under the bill as now drafted would require acquisition of the entire "project," which is a defined term in the Federal Power Act and would include extremely large areas of land at big project sites. (16 U.S.C. 796(11)).

Furthermore, in those few cases where a prospective applicant does own the entire "project," which is conceivable at some small sites, a site-owner preference would discourage not only the speculators at which the bill is aimed, but also any company or individual no matter how good his intention. This is because a prospective applicant sincerely interested in developing the site would be unlikely to make a large investment in a preliminary permit and associated studies knowing that the site owner could subsequently assert a preference. This result would be contrary to the national policy to encourage hydro development.

We are also greatly concerned by the provisions in S. 2500 that would require a new and more difficult standard for selection between two applicants for a permit or license. S. 2500 seems to say that a non-preference applicant for a permit or license must demonstrate that his proposal is "substantially superior" to the alternate proposal. Present law requires the municipal preference applicant to show that his plan for development is "equally well-adapted". Not only is there a new basis for comparison but it also appears the burden of proof has been shifted.

In our view, a solution to this problem lies in better FERC management of the permitting and licensing system. For example, a solution to the photocopied duplicate filing problem and an examination of the merits of different proposals for the same site rather than the simplistic "first filed" rule can and should be done administratively by FERC.

In regard to section 5 of the bill, our members are cognizant that "highest and best use" is now the standard generally applied in condemnation proceedings. However, we are concerned that an attempt to express this in simple statutory language would have unknown and unforeseen consequences. In addition, the bill does nothing to resolve the present uncertainties in the application of the "highest and best use" standard.

Finally, the effect of S. 2500 on preference in relicensing is unclear. That issue is now before the 11th U.S. Circuit Court of Appeals for decision, and we believe there should be no legislative intervention in this area until the court has decided the issue and all concerned have had time to weigh that decision.

In conclusion, we believe this legislation creates more problems than it solves and may have highly controversial implications. We are also concerned that S. 2500 may discourage rather than encourage hydroelectric development.

Thank you for the opportunity to comment on this legislation.

Sincerely yours,

Gilbert LeKander
Chairman
Hydroelectric Power Issues
Group

GL:jss

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July 21, 1982

Honorable Gordon J. Humphrey
Chairman
Subcommittee on Energy Regulation
Senate Energy Committee
Senate Office Building
Washington, DC 20510

Dear Chairman Humphrey:

On behalf of the members of the Great Lakes Electric Consumers Association, I would like to comment on S. 2500, the "Federal Power Act Amendments of 1982." GLECA is the regional organization representing municipal electric utilities and rural electric cooperatives in the nine states of the Great Lakes area, including Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, Pennsylania, West Virginia, and Wisconsin. There are 650 consumer-owned electric systems in the region serving 2.5 million consumers.

One of the principle goals of GLECA and its members is the development of hydroelectric resources in a manner which protects the public interest. Many members are in the process of developing hydroelectric projects utilizing the existing laws administered by the Federal Energy Regulatory Commission. Development by consumer- owned electric systems will insure that the ultimate consumer receives the benefits of hydro power at the lowest cost because of the non-profit nature of municpal and cooperative utilities. Waters being used for hydroelectric project development belong to all the people, and development by consumer-owned insures that consumers benefit directly in the use of the nation's waters.

With passage of the Federal Power Act in 1920, Congress adopted a regulatory procedure which has withstood the test of time in preventing private exploitation of a public resource. Primarily, this policy is expressed in the preference provisions of the Act where public bodies, such as municipal electric utilities, receive priority in obtaining preliminary permits or

GLECA
GREAT LAKES ELECTRIC CONSUMERS ASSOCIATION
720 North High School Road
P.O. Box 24517
Indianapolis, Indiana 46224

licenses. Congress made it clear that way the nation's waters remained in public control and use.

S.2500 would change the existing provisions of the Federal Power Act in a profound and undesirable manner by upsetting the existing preference provisions. For this reason, the members of GLECA passed a resolution this April opposing the legislation.

Under the bill, the policy of Congress extablished in 1920 would be overturned. Private land owners would receive preference in the development of hydroelectric projects. Such a scheme would base project development solely on the fact of ownership. This is not in accord with the based policies of the Federal Power Act. Preference under the Act has not precluded private development of hydroelectric projects by property owners or other private profit-making entities. What preference has done is to insure that private dominance or monopolization of the nation's waters has not taken place.

Awarding preference to property owners also places the development of hydroelectric project sites in the hands of entities who do not have a utility responsibility to serve all consumers, or the experience to develop and intergrate a project into a utility system. If not properly integrated, the cost of power from a project is likely to increase, making it uncertain that power from a project could be disposed of in an ecomomical manner. Unlike consumer-owned utilities, the sole motivation of a property owner is to maximize financial return instead of designing and operating a project in a manner consistent with sound utility practices. Such a possibility is at odds with rational development of hydroelectric projects, such as done by utilities with a responsibility to serve consumers.

Instead of narrowing the preference provisions of the Federal Power Act with respect to public bodies, GLECA supports the inclusion of rural electric cooperatives as preference entities entitled to priority in the award of preliminary permits and licenses. By historical accident, rural electric cooperatives were not included as preference applicants when the Act was passed in 1920 because most of them were not formed until the 1930's. Yet, they share the non-profit and consumer-owned

attributes of publicly-owned utilities. Such an amendment to the Federal Power Act would bring it in line with statutes relating to the marketing of power from federal power projects where cooperatives are given a preference by Congress.

The electric industry in this nation is unique. It consists of diverse ownership of utilities-public, cooperative, private and federal. Competition is the rule, not the exception, as in most large industries. Part of the competitive influence has been the existing preference provisions of the Federal Power Act. No need has been demostrated that this preference should be upset in favor of property owners. Congress should not overturn a delicate scheme of permit and license awards which is working well in protecting the nation's waters from exploitation or less than full development.

GLECA requests that this statement be made part of the record to be compiled during the July 22, 1982 hearing on S. 2500.

Sincerely,

Frank W. Frisk Jr.

Frank W. Frisk, Jr.
Executive Director
Great Lakes Electric Cooperative Association
2025 Eye Street, N.W.
Suite 1022
Washington, DC 20006
(202) 296-3787

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Mid-West Electric Consumers Association, Inc.

EXECUTIVE OFFICE SUITES
27972 MEADOW DRIVE, SUITE 300
P.O. BOX 910
EVERGREEN, COLORADO 80439
(303) 674-6675

LOW COST POWER FOR EVERYONE

July 21, 1982

Honorable Gordon J. Humphrey
Chairman
Subcommittee on Energy Regulation
Senate Committee on Energy
Senate Office Building
Washington, DC 20510

Dear Chairman Humphrey:

On behalf of the Mid-West Electric Consumers Association, I would like to express our opposition to S. 2500, the "Federal Power Act Amendments of 1982." Mid-West is the regional organization of the 300 rural electric cooperatives and municipal electric utilities in Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming, all of whom have an interest in the development of hydroelectric projects in serving their consumer-owners.

Jnder any interpretaion of S. 2500, it is clear that preference in the awarding of preliminary permits and licenses would be given to private property owners of project sites. Under the existing provisions of the Federal Power Act, preference is given to public bodies such as municipal electric utiities. This preference was the result of Congressional concern in 1920, when the Act was passed, that the nation's waters would be exploited by private concerns whose motivation was only profit, not to benefit consumers. A yardstick of competition in hydro project development was created through the preference

Mid-West Electric Consumers Association, Inc.

EXECUTIVE OFFICE SUITES
27972 MEADOW DRIVE, SUITE 300
P.O. BOX 910
EVERGREEN, COLORADO 80439
(303) 674-6675

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provisions. Since 1920, the wisdom of Congress has been shown, in that public, cooperative and private entities have developed hydrelectric projects. There has been no monpolization of the nation's water resources which are owned by the people.

Consumer-owned utility hydro development provides the owners of the water, consumers, with direct benefits on a non-profit basis. Further, federal development of hydroelectric resources in the Mid-West area has enabled the benefits of multipurpose projects to be shared by all consumers, farmers, and industry in the region. The goal of the people benefitting by development of hydroelectric resources, a long-standing national policy, has and is working well. There may be regulatory changes needed to improve the process of project licensing, but destroying the existing statutory scheme in favor of private property owners is not the answer.

Even though S. 2500 seems to give a nod to applicants in competition with private owners when their plans "are substantially superior," that standard would be virtually impossible to satisfy. Under the Act "best adapted" to comprehensive development plans are favored when there is competition for a site. The standard of the bill- "substantially superior" - would require such a vast difference in plans, that it would be impossible to compete with a private owner if the applications were even reasonably close to each other. The "best adapted" approach is well-defined in Commission decisions. A new standard would throw the regulatory process into disarray.

Private property owners have no utility responsibility. As such, projects would be designed not to meet the needs of consumers, but the profit motives of the developer. What Congress prevented in 1920, private underdevelopment of the

MT ND MN
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CO KS

Mid-West Electric Consumers Association, Inc.

EXECUTIVE OFFICE SUITES
27972 MEADOW DRIVE, SUITE 300
P.O. BOX 910
EVERGREEN, COLORADO 80439
(303) 674-6675

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nation's waters, would now become a reality. Projects designed for profit will not insure that power from such projects is utilized in a manner reflecting the obligations of a utility. In the case of consumer-owned utilities, this means the lowest possible rates and operational plans fully utilizing the potential of a hydroelectric project.

Most property owners would not develop projects themselves, but would turn to others to do the job. This adds another layer of profit which will ultimately be borne by the consumer. An unnecessary and undesirable middleman is added to hydroelectric project development.

Mid-West also opposes changing the standard of eminent domain compensation from the present "fair market" value to the "best" and "highest" value of dam sight. The value of a dam site is not increased until a project is completed. Eminent domain occurs before development is begun; adding value for eminent domain at that point is nothing but a windfall for property owners which will be charged to consumers.

Instead of overturning the present competitive purposes of the Act, and the protection of the nation's waters from private exploitation, Mid-West suggests that the Act be amended to include rural electric cooperatives as being entitled to the same preference as municipal electric systems. In 1920, cooperatives did not exist, and were not included in the Act. They are included as preference entities in all statutes relating to the sale of power from federal projects for the same competitive and consumer protection purposes as found in the Federal Power Act. Extending preference to cooperatives would insure that all consumers of non-profit utilities are sharing in the direct use of the nation's waters.

MT ND SD WY NE IA CO KS

Mid-West Electric Consumers Association, Inc.

EXECUTIVE OFFICE SUITES
27972 MEADOW DRIVE, SUITE 300
P.O. BOX 910
EVERGREEN, COLORADO 80439
(303) 674-6675

Mid-West requests that this letter be made part of the record compiled during the hearings on S. 2500 to be held on July 22,1982.

Sincerely,

Fred G. Simonton

Fred G. Simonton
Executive Director
Mid-West Electric Consumers Association
P.O. Box 910
Evergreen, Colorado 80439
(303) 675-6675

FS/ew

LOW COST POWER FOR EVERYONE

MT ND SD WY NE CO KS IA

STATEMENT OF MORGAN D. DUBROW
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
ON WATER RESOURCES DEVELOPMENT

BEFORE
THE SUBCOMMITTEE ON ENERGY REGULATION
COMMITTEE ON ENERGY AND NATURAL RESOURCES

July 22, 1982

Mr. Chairman and members of the Subcommittee, my name is Morgan D. Dubrow, Senior Staff Engineer of the National Rural Electric Cooperative Association (NRECA). NRECA is a national service organization representing about 1000 rural electric systems located in 46 states. These systems, mostly all cooperatives, serve more than 25 million consumers in 2600 of the 3100 counties in the United States. Members of NRECA provide electricity to about 75 percent of the land area of this nation.

We appreciate the opportunity to submit a statement. NRECA must oppose S. 2500, as written. However, we agree with the purpose of this bill which would amend the Federal Power Act to reduce conflicts in the licensing of hydroelectric powerplants and expedite the development of and simplify the regulation of hydroelectric powerplants. We certainly recognize the need to reduce conflicts and to expedite and simplify the Federal Power Act so as to facilitate the development of hydroelectric powerplants by non-Federal interests.

A statement covering this subject was presented on behalf of our association on October 19, 1981 in connection with H.R. 3508 and H.R. 4159 before the Subcommittees on Water and Power and Energy Regulation. In this statement we commended the Hydroelectric Licensing Division of the Federal Energy Regulatory Commission for its efforts in expediting the processing of preliminary permits for hydroelectric projects. We believe the real problem lies in the wording of the Federal Power Act. What is really required is specific language amending the Act that gives the Commission the authority to set definite schedules and deadlines so that a one-stop licensing process is a reality. The language which would

achieve this purpose was furnished last year by the Federal Energy Regulatory Commission to the Appropriations Subcommittee on Energy and Water Development of the House of Representatives. It is our understanding that the same language also was submitted to the House Subcommittees on Energy Conservation and Power, Energy and the Environment, and to this Senate Subcommittee as well.

Our basic objections to S. 2500 as now worded are as follows:

1) The bill is counter to the preference requirements of the Federal Power Act which was established in 1920. The Act gives preference in the development of hydroelectric power sites to states, public utility districts, municipals and other state entities. In this connection, we respectfully advise the Subcommittee that rural electric cooperatives are not given preference under the Federal Power Act because they did not exist until 1935 with the passage of the Rural Electrification Act. It is clear from the Reclamation Act, Flood Control Act of 1944, Tennessee Valley Authority Act, and the Bonneville Power Administration Act that the Congress intended for rural electric cooperatives to receive preferential treatment in the sale of power from hydroelectric facilities built by the United States. It logically follows that the Congress would have included rural electric cooperatives in the preference provisions had they existed at the time of the passage of the Federal Power Act. For this reason, we respectfully request that this bill be amended to achieve this objective.

The following resolution in support of preference for rural cooperatives in hydroelectric development was adopted on January 29, 1981 at NRECA's 39th annual meeting in San Francisco, California:

"Rural electric cooperatives are consumer-owned organizations and as such have equal preference rights as municipalities and state agencies in all matters regarding generation except licensing of hydroelectric projects under the Federal Power Act.

"Under the present Federal Power Act, however, if a rural electric cooperative files for a preliminary permit or license for a hydroelectric project, a municipality or state agency, by merely filing a competing application, can exercise its preference rights and thereby take the proposed project away from the rural electric cooperative. Rural electric cooperatives in all regions of the United States have experienced this problem and, after expending sums of money to study development of projects, have seen municipalities and state agencies use their preference rights and leave rural electric cooperatives completely out of hydroelectric projects. The lack of equal preference by rural electric cooperatives in licensing hydroelectric projects has created such uncertainty that many rural electric cooperatives are now not willing to seek to develop hydroelectric projects.

"When Congress originally included municipal and state agency preference in hydroelectric licensing procedures, no rural electric cooperatives were in existence. Since that time, Congress has consistently indicated that rural electric cooperatives should receive equal preference along with municipalities and state agencies in such matters as power output from federal projects. In this light, therefore, we feel no just reason exists for rural electric cooperatives not to receive equal preference status in connection with licensing hydroelectric projects.

"We believe further it is contrary to the national interest not to attempt to create an atmosphere where maximum development of hydroelectric projects is paramount. To this end we request and urge the Congress of the United States to amend the Federal Power Act so that rural electric cooperatives will receive equal preference rights along with municipalities and state agencies in licensing hydroelectric projects, and we urge support of such legislation by all interested organizations, including the American Public Power Association.

"We will resist vigorously any effort--legislative, judicial, or administrative--to repreal or significantly dilute the nation's preference laws relating to the marketing of federal power and the initial issuances or subsequent reissuances of hydroelectric licenses."

2) The bill as drafted could deter the development of hydroelectric projects by having the land owners of the power site be in a position to claim that the highest and best use of the land might be for concentrated manufacturing or urban development which would greatly appreciate the land values. This could deter construction of hydroelectric power facilities.

3) The bill could be anti-development in that it allows property owners to tie up potential hydroelectric power sites.

4) The bill could encourage entrepreneurs to buy up sites and auction them off to the highest bidders, thus greatly increasing the cost of power development.

5) The bill requires a superiority test as a substitute for equivalent development. As we understand it, this would mean that a nonowner who wished to develop the site would have to prove that his proposed plan of development was not only equivalent but superior to any plan proposed by the property owners.

In summary, we would ask that S. 2500 be revised to incorporate language previously submitted to the Subcommittee by the Federal Energy Regulatory Commission to achieve one-stop licensing of hydroelectric power sites. In our view a bill which would provide for one-stop licensing as recommended by FERC and supported by us in testimony presented to the Subcommittee on October 19, 1981 would achieve the basic objective of S. 2500. In addition, we would urge that the bill be further amended to provide preference to consumer-owned rural electric cooperatives for the licensing and development of hydroelectric power facilities. The association staff stands ready to provide assistance to the Subcommittee in drafting such an amendment.

We appreciate this opportunity of presenting our views to the Subcommittee.

Statement on S.2500, a bill to amend the Federal Power Act to reduce conflicts in the licensing of hydroelectric powerplants and to expedite the development of and simplify the regulation of hydroelectric powerplants and for other purposes.

Submitted to the Senate Subcommittee on Energy Regulation.

13 August 1982

HYDROELECTRIC POWERPLANT LICENSING: CONSERVATION AND THE PUBLIC INTEREST IN HISTORICAL PERSPECTIVE

Submitted by:

Harold Issadore Sharlin
HIS Associates
2832 Northampton Street NW
Washington, D.C. 20015
(202) 966-2122

Dr. Sharlin, B.S. in electrical engineering and Ph.D. in economic history, has published three books on the history of electrical theory and engineering. He has taught electrical engineering and the history of science and technology before coming to Washington where he has done policy analysis on energy and regulation at the Department of Energy, Department of Commerce, Office of Technology Assessment, and the U.S.Regulatory Council. Dr. Sharlin has specialised in his research and writing on the history of and government policy on hydroelectric power.

If the passage of S.2500 establishes a method of resolving the public-private controversy over hydroelectric dam relicensing by allowing for necessary changes in the procedure while remaining true to historical tradition, the legislation will have made a significant contribution to the formulation of a national energy policy. The implementation of the legislation will require some difficult issues to be resolved, as the testimony thus far has suggested, but my purpose in this brief historical analysis is to test whether the bill truly reflects the change of social and economic conditions from the time when the Federal Water-Power Act was passed in 1920 to the present. If S.2500 constitutes no significant change in policy except to adjust for the change in social and economic context, the bill is self-evidently justified. If, on the other hand, S.2500 represents a sharp break with historical tradition and represents a mistaken interpretaion of social and economic change since 1920, the legislation requires political justification for wanting to change one of the basic tenets of our energy policy and indeed the country's natural resources policy, namely, that

a judicious balance between public and private development of energy resources is in the public interest.

My presentation will be limited to the historical analysis, in each instance merely suggesting what further analysis will reveal of two questions: How, historically, has the federal government selected the agent who will be allowed to develop energy resources, in particular, waterpower? What is the difference between government and private ownership in the distribution of the benefits of electricity?

Although S.2500 deals only with the relicensing of hydroelectric dams, the original Federal Water-Power Act set a policy for development of hydroelectricity and for the distribution of electricty regardless of the sources. Only adjustments of these policies to changes are warranted on historical grounds. Fundamental changes in the policies themselves must be justified in political terms. My object is to throw some historical light on the issues surrounding hydroelectric dam licensing so that the present debate can be directed towards points which are legitimately, that is, not due to historical misinterpretation, in contention.

<u>How were hydroelectric dam licensees chosen in the first place?</u>

Two principles were followed in granting the

original hydroelectric licenses, and they pertain today in the relicensing contests, although the implication of the principles may be different. The two principles were conservation and the public interest.

Conservation

The Water-Power Act was conceived during the beginning of the conservation movement. Conservation began as a movement in 1907 when Gifford Pinchot, a forester, related forestry with streams and in turn with navigation, waterpower, and flood control. His idea was that conservation, or wise use, entailed using one resource, such as the way trees were harvested, so as not to cause undue damage to another resource. Unwise forestry led to erosion, which made the land unusable for agriculture.

With time, the idea of conservation has become more inclusive, and today conservation also incorporates environmental concerns. The word "conservation" has through historical usage come to mean the use of one resource without unnecessarily disturbing the balance existing between resources, and that the use of one resource should not limit, prevent, or interfere with the use of an associated resource. Pinchot's idea of conservation accepted that the use of one resource had a disturbing effect on associated resources. Forestry

was his model. The idea of conservation, given its origins, means wise use and not the sequestering of resources.

From forestry Pinchot formed an easy transition to the waterways, which like forests, had a number of uses (navigation, irrigation, and recreation); each use had to impinge on alternative uses. That idea of conservation, meaning that resources were there to be used for the benefit of all but, used wisely, was broadened gradually to include energy resources such as hydroelectricity, coal, and oil. More recently, the aesthetic value of natural resources has come to the fore, and environmental concerns have come to mean the minimizing of the impairment of the aesthetics in resources. In an extreme position, environmentalists have tried to prevent rather than control the use of natural resources, as happened in the Hetch Hetchy conflict, where they attempted to prevent an alternative use of a canyon.

In the awarding of hydroelectric dam licences, the conservation principle holds but has been broadened with time to include the environment as well as other resources and has been extended geographically. A dam was first seen to involve a section of a river

and involved the conservation of navigation, irrigation, flood control, and recreation as well as being a source of electric power. With TVA, hydroelectric dams became projects that involved conservation of entire river basins.

With the growing complexity of hydroelectric projects, conservation increasingly meant the wise use of completing uses of natural resources, and it was no longer possible to determine the dollar benefits quantitatively. The value of recreational facilities had been the most troublesome of the calculations but, with the increasing number of factors to be considered, dollar values of competing uses became more and more difficult to calculate. Finally, the issues became as complicated as the question, how was the aesthetic value of the environment to be priced? The public perception of the risk to the environment, not some quantitative approximation, became the prime factor to be considered in granting some dam licenses. Engineering calculation of the costs imposed on an area and environmental impact statements told only a part of the story. Applicants for licenses found that the public perception of risks to the environment, which now meant every possible aspect of conservation, was amorphous but still a major factor to be considered in awarding a hydroelectric dam license.

Much research is being done on the public perception of risk, but much more needs to be done before the question can be dealt with in a rational manner.

The public has assumed that the federal government is best able to employ waterpower according to what is perceived as the highest conservation standards. Public ownership of licenses seems indicated only when the scale is that of a river basin, but adequate assurances of wise use has been obtained in hundreds of cases involving less extensive projects where the dam license is privately owned. In only a few instances have the principles of conservation been a determining factor in the choice between public and private applicants for licenses. With the exception of large river basin develment, either private or public holders of licenses have been equally effective in the conservation of the resources associated with waterpower.

Is relicensing, as provided for in S.2500, in keeping with the intent of the original Water Power Act to grant license on the principle of conservation or wise use? One can assume that the current licensee when first making application fifty years ago had plans approved by the FPC that, to the minimum extent possible, did not limit, prevent, or interfere with the use of associated resources, that is, the plans were in keeping with the highest standards of the conservation principle.

Many things could have happened in fifty years that will requre a re-analysis of the site, using the conservation principle as a standard. For example, the hydroelectric dam for reasons of shifting water use may now be part of a river basin where originally the dam affected a more limited area. Or other resources, including the environment, need to be conserved using different methods.

Before issuing a new license for an existing dam, a conservation assessment should be made that (1) establishes the basis for the original license, (2) examines the historical changes that have occurred and (3) specifies modifications of the project that will continue to provide for wise use of the waterpower resource. No other special conditions other than these modifications should be added to change the policy set down in the original Federal Power Act. Conditions that have no basis in historical tradition will force a thorough reevaluation of the original policy. In the event of such a departure from the historical tradition, a new power act will have to be drawn with completely different standards for evaluating applications for licenses of existing projects. The public versus private issue, in that event, will then be in an utter state of confusion.

The Public Interest

The more rigorous definition of the public interest, as that term is applied to waterpower, entails the principle of government regulation of a limited resource when the use of that resource is affected with the public interest, that is, the use is necessary to the well being of society. The public interest can be protected by government ownership of the resource or by regulation of the private owner of the resource. Where a dam is property affected with the public interest, and a dam usually is, neither private nor public ownership is an obvious indication.

Historically, the government allowed private enterprise to develop new energy resources and only stepped in when necessary to restrain monopolistic practices. President Theodore Roosevelt believed that a monopoly of energy resource production was a serious threat to the foundation of the economy, hence, it was in the public interest to regulate private owners of dam licenses. In 1900, waterpower or hydroelectricity was a promising new energy resource. It was a renewable resource and competitive with other energy resources that, it was feared, were rapidly becoming unavilable. In a veto message in 1909, Theodore Roosevelt called attention to the interrelation of energy resource end use. He told the Congress:

"A single generation will see the exhaustion

of our natural resources of oil and gas and such a rise in the price of coal as will make the price of electrically transmitted water-power a controlling factor in transportation, in manufacturing, and in household lighting and heating."

Hydroelectricity, according to these words of President Roosevelt, was affected with the public interest because water power had become an economic necessity and it was fast becoming a scarce resource, or so it was thought in 1909. To regulate waterpower in the public interest while encouraging private development, the 1920 Water Power Act required that licensees show that they were making the most efficient use of the site, that the project would be completed within the prescribed time, and the licensee's rights were further limited by having the grant for only fifty years.

The beginning of the hydroelectric era corresponded with and was complmentary to the rapid growth of electric power generation. Consumption of electricity increased 3 3/4 times the rate of population increase in 1929. From 1882, the year of Edison's first central station, until 1929, the output of electricity doubled every 5.5 years and by 1929 the United States had one-half of the world's electric

generating capacity.

But growth in electric power in the hands of private enterprise followed economic law, and the rapid expansion of the use of electricity was accomplished by concentrating on industrial electrification. In Europe where public ownership of the electric power systems was the rule, rural and domestic electrification was emphasized at the expense of the industrial market for electricity. By 1929, the United States had made little progress towards rural electrification compared to Germany, Sweden, Denmark, or Canada. Although one-half of the United States population was classified as rural in 1929, less than 10% of the farms were electrified.

Distributing the Benefits of Electricity

The public interest has been equally well served in the development of hydroelectricity whether that development was by government or by private enterprise. The Water Power Act gave the Federal Power Commission (now FERC) the responsibility for reviewing development plans to assure that the sites were being put to the most efficient use and, in addition to that supervision, investor owned companies had the profit motive as a prod for obtaining the maximum utilization from a given site. The primary difference, historically, between government and private ownership of generating plants has been in the organization of distribution of the electric power.

The statistics reveal that the difference between

public policy and private corporate strategy for distribution lies in the marketing program of each. Government policy in the United States, as in the rest of the world, has been, historically, to distribute electricity first to rural and domestic customers and then to industrial customers. But the lead in the development of electric power in the United States was given to private enterprise and that is the reason for the slow pace of rural electrification compared to industrial electrification. Private enterprise utilties sought industrial customers.

TVA, the model for government ownership, began with a policy of residential rates well below the national average, in order to encourage domestic consumption. In 1937, TVA rates were about three cents per kilowatt-hour compared to the national average of four and four-tenths cents per kilowatt-hour. The result of that policy was that the average annual residential use of electricity in TVA territory was about 1300 kilowatt-hours and the rest of the country had an average annual rate of use of about 800 kilowatt-hours. On the other hand, TVA found that it had to cultivate industrial sales if costs were to be kept low. So, in theory, a government owned generating system will favor domestic users but will, for reasons of economic necessity, maintain an appreciable industrial load.

The distribution effect fostered by investor owned

utilities weighs in favor of industrial use because factories consumed electricity at a more steady rate daily, monthly, and annually. Electricity cannot be stored and an unharnessed flow of water is wasted. The most economical use for hydroelectricity is to supply customers who can use the electricity at the rate of most efficient production, that is continuously. The Niagara Power Company former holder of the Federal Power Commission's license number 16 for the hydro plant at Niagara Falls used a very simple example to dispel the myth of "cheap" hydroelectric power. The investor owned company explained that the charge to industrial customers, the largest of which were electro-chemical manufacturers, for Niagara hydroelectricity was $27.76 per kilowatt-year. The contracts with industrial firms were for bulk amounts on an annual basis regardless of the amount used. To sell the same power to a residential customer who would use the electricity one-third of the time, Niagara Power would have had to charge the householder, they said, three times the price that they asked from the industrial customer. So much for "cheap" hydroelectricity. The strategy of the Niagara Power Company, which was similar to that of other investor owned companies, was to sell 80% of its electricity to industrial customers and reserve the remaining 20% for rural and domestic users.

Publicly owned power plants followed a distributional

policy that viewed electricity as an agent for social change. Electric power property affected with the public interest was supposed to serve social ends. The preference clause, which favors municipally owned or cooperatively owned power companies in competition with an investor owned company for a license, was intended to reserve portions of hydroelectric power for rural and residential users. In this instance the government did not own the property but regulated in the public interest. In 1924, Pennsylvania had a Giant Power Plan with the main objective being to electrify every farm house in the state. TVA, the grand experiment, was intended to transfom the living standards of a river valley. Government ownership and government programs, such as, the Rural Electrification Administration, had as a primary goal distributing the benefits of electric power to the home and the farm. The most forceful argument made by the Power Authority of the State of New York in 1956 in capturing the privately held license for Niagara Falls was that the Authority would give first consideration to its rural and domestic customers. PASNY's charter requires that it follow that distributional policy of supplying households first and industry second. Thus many devices were used to balance the distribution of the benefits of electric power between industry where electri-

fication caused an economic benefit and domestic users where it caused a social benefit. In these ways, region by region, a judicious balance between government owned and investor owned generating and distributions systems has been accomplished.

But the government owned and the investor owned companies are not at opposite extremes in their marketing practices. Just as the government owned corporations develop their industrial load because they find themselves driven by the iron laws of economics and the need to pay interest on bonds, so investor owned companies have done much to develop their rural and domestic loads encouraged by governmental pressure. The electric iron, once the home applicance that used the largest amount of electricity, was given to customers free in a 1905 promotion scheme in order for investor owned utilities to build domestic load. Electric companies opened appliance stores to encourage householders to use more electricity. At one time, the Niagara Power Company owned ninety-three appliance stores.

The motive of investor owned companies may have been partly to counter the criticism that they neglected domestic users and favored large scale industrial users, but the result has been a moderating of the industry-first policy. Both government owned systems and investor owned systems

have moderated their distributional policies over the years so that there has been a narrowing of the distinction between them.

Does Government Ownership Differ from Investor Ownership?

Historically, there was, sixty to eighty years ago, a clear distinction between government ownership and investor ownership, when the issues were selecting a licensee for an undeveloped dam site or favoring one type of ownership over the other because of their distributional policies. Even though history has wrought changes, some principles remain unchanged: 1. The conservation principle has been extended and expanded in being applied to waterpower sites, but the basic principle prevails: wise use of a resource requires the minimum amount of limitation, prevention, or interference with the use of associated resources including the environment. 2. All major water power sites have been utilized and, since that scarce resource has already been allocated, there is no justification for favoring one type of ownership over the other because the properties are NOT "affected with the public interest" in the original meaning of the term. 3. Investor owned companies no longer need an inducement to build and develop hydroelectric dams as they did in 1920 when the Water Power Act was passed. The high cost of alternative fuels has given hydroelectricity an unusual economic advantage that attracts those who want to invest in electric power plants. 4. Every farm and urban dwelling is now supplied with electricity, so it is an anachronism

to support government ownership in order to have a distributional policy that favors rural and domestic users.

Conclusion

The anachronisms of the Federal Power Act should be removed in order to bring the intent of the Act into correspondence with present social and economic conditions. Other than removing anachronisms, it does not appear to me that the Act can or should be made more specific. The questions relating to the development and distribution of electricity are regional and should be answered on that level. The country needs a judicious balance between government owned and investor owned generating systems. No act of Congress should try to impose a national solution to what is inherently a regional issue.

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